CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 863

THE CITY OF NEW YORK, PETITIONER,

vs.

MICHAEL FEIRING, TRUSTEE IN BANKRUPTCY OF NATIONAL STUDIOS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 22, 1941.

CERTIORARI GRANTED APRIL 14, 1941.

BLANK PAGE

INDEX

TESTIMONY.

BLANK PAGE

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1941.

—3851

BLANK PAGE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

1

IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt,
CITY OF NEW YORK,
Claimant-Appellant.

Statement Under Rule 13.

This proceeding was commenced on February 17, 1940 by 2
service upon the office of the Comptroller of the City of New York of a notice of motion dated February 17, 1940, and petition verified by the Trustee on February 15, 1940, objecting to the amount and to the priority of the proof of claim filed by the City of New York, appellant, for sales and business taxes. On April 1, 1940 a hearing was had before Hon. Robert P. Stephenson, Referee in Bankruptcy. The opinion of the Referee was handed down on June 6, 1940 and an order fixing the amount of the claim as stipulated to by the parties and granting priority thereto was made and filed on June 17, 1940. The Trustee's petition to review dated June 19, 1940 was filed on June 20, 1940 and 3
the Referee's certificate was made and filed on June 21, 1940.

The matter came up before Hon. John W. Clancy, U. S. D. J., who, on August 8, 1940, rendered an opinion upon which an order was made under date of August 16, 1940 and entered on September 24, 1940 reversing the order of the Referee so far as it granted priority to appellant's claim for sales taxes. Appellant filed a notice of appeal from this order on October 3, 1940.

The Trustee appears by Benjamin Siegel, Esq., and claimant-appellant appears by William C. Chanler, Corporation Counsel of the City of New York. There have been no changes in either the original parties or counsel.

4 **Proof of Claim of the City of New York.**

72936

B 202-10-38 Claim No. 1515

IN THE MATTER of NATIONAL STUDIOS, INC. 226 West 56 Street New York, N. Y. Bankrupt.	File With Hon. R. P. Stephenson, Referee U. S. Court House Foley Square New York, N. Y.

5 Comes Samuel Orr, Special Deputy Comptroller of the CITY OF NEW YORK, a duly authorized agent for the City of New York in its behalf, and says that the above named bankrupt is justly and truly indebted to the City of New York for taxes as follows:

Nature of Tax Local Law Involved	*Year or Taxable Period*	*Tax*	*Interest Penalty*	*Total*
SALES TAX (M-6155)				
L.L. 20 of 1934—Amended	12/10/34-12/31/35	$1,451.20	$319.22	$1,770.42
29 of 1935	1/ 1/36- 6/30/36	580.72	98.60	679.32
31 of 1936	7/ 1/36- 6/30/37	662.48	79.44	741.92
20 of 1937—Amended	7/ 1/37- 6/30/38	503.84	30.18	534.02
21 of 1938 (Ch. 41, Title "N" Administrative Code)	7/ 1/38- 1/10/39	161.47	3.22	164.69
6 Total Due for Sales Tax		$3,359.71	$530.66	$3,890.37
BUSINESS TAX (M-12279)				
L.L. 9 of 1934	1933	$ 65.11		$ 65.11**
17 of 1934—Amended	1934	223.76		223.76**
32 of 1935	1935	167.43		167.43**
29 of 1936	1936	88.55		88.55**
22 of 1937	1937			00
20 of 1938 (Ch. 41, Title "O" Administrative Code)	1938	45.13		45.13
Total Due for Business Tax		$589.98		$589.98

*Not Included Above.
**Unpaid previous assessment (to be cancelled).

Total Claim as Indicated Above $4,480.35

Proof of Claim of the City of New York.

Together with additional interest at ½% per month until paid. Additional interest begins March 15, 1939.

That no part of said claim has been paid but that the same is due and payable at the office of the City Treasurer, 50 Lafayette Street, New York City.

That no security is held by the City of New York, and that there are no offsets or counterclaims.

Notice is hereby given that the Comptroller of the City of New York reserves all of the City's rights to make a determination of additional tax in accordance with the provisions of the Local Laws, and file an additional claim therefor.

Attention is hereby called to the provisions of the Local Laws of the City of New York authorizing the Comptroller to enforce payment of any unpaid tax due thereunder.

You are further advised that the claim of the City of New York is a prior claim and that no distribution of the taxpayer's assets may be made before the claim of the City of New York is paid.

SAMUEL ORR
SAMUEL ORR
SPECIAL DEPUTY COMPTROLLER
OF THE CITY OF NEW YORK

Sworn to and subscribed before me
this 20th day of March, 1939.

(COPY) IRVING SCHACHTER

by (COPY) EDWARD F. BENNETT
Review and Settlements Section

Receipt is acknowledged of the original of this proof of claim.

Dated, March 21, 1939.

Signed ROBERT P. STEPHENSON
Referee in Bankruptcy

10 **Notice of Trustee's Objection to City's Claim.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	Notice of Hearing Re: Objection to Claim of the City of New York. No. 72936

11

SIRS:

PLEASE TAKE NOTICE that upon the annexed objection of the Trustee, duly verified the 15 day of February, 1940, and upon all the proceedings heretofore had herein, a motion will be duly made at a Term of this Court, to be held before Hon. Robert P. Stephenson, Referee in Bankruptcy, at Room 201, United States Courthouse, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 1st day of March, 1940, at 2:00 o'clock in the afternoon of said day or as soon thereafter as counsel can
12 be heard, for an order expunging the claim of The City of New York filed as an alleged priority claim against this estate in the sum of $4,480.35 and adjudging that said claim is not entitled to priority of payment, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, February 17th, 1940.

Yours, etc.,

BENJAMIN SIEGEL,
Attorney for Trustee,
Office and P. O. Address,
280 Broadway,
Borough of Manhattan,
City of New York.

Petition.

To:

THE CITY OF NEW YORK,
Claimant,
50 Lafayette Street,
New York City.

Petition.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt.

TO HONORABLE ROBERT P. STEPHENSON, REFEREE IN BANKRUPTCY:

MICHAEL FEIRING, Trustee herein, does hereby object to the proof of debt filed by The City of New York as a priority creditor against this estate in the sum of $4,480.35.

That said objection is made upon the following grounds:

1. That this estate is not indebted to said alleged creditor in the amount set forth in said proof of debt.

2. That the obligation set forth in said proof of debt is not entitled to priority of payment under the Bankruptcy Act.

16 *Petition.*

WHEREFORE, the Trustee respectfully prays that the claim of The City of New York filed as an alleged priority claim against this estate in the sum of $4,480.35 be expunged from the claims on file herein and no dividend declared thereon, and said claim be adjudged not a priority claim against this estate.

Dated, New York, February 15th, 1940.

MICHAEL FEIRING,
17 Trustee.

City, County and State of New York, ss.:

MICHAEL FEIRING, being duly sworn, deposes and says: That he is the Trustee herein; that he has read the foregoing objections and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

MICHAEL FEIRING.

18

Sworn to before me this
15th day of February, 1940.

EUGENE A. CANTOR,
Notary Public, Westchester County.
N. Y. Co. Clks. No. 1155, Reg. No. 1C673.
Commission Expires March 30, 1941.

19

Minutes of Hearing Before Referee In Bankruptcy.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN BANKRUPTCY

IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt.

20

Before: HON. ROBERT P. STEPHENSON, Referee.

United States Court House,
Foley Square, New York, N. Y.,
April 1, 1940,
at 2:00 p. m.

21

ADJOURNED HEARING ON MOTION TO EXPUNGE THE CLAIM OF THE CITY OF NEW YORK

PROCEEDED PURSUANT TO ADJOURNMENT

APPEARANCES:

BENJAMIN SIEGEL, Esq., Attorney for the Trustee.

WILLIAM C. CHANLER, Esq., Corporation Counsel; by M. L. Heath, Esq., Assistant Corporation Counsel.

Mr. Heath: The City states that the amount of Sales Tax due, as stipulated to with Mr. Siegel, is $796 inclusive of interest. The Business Tax has also been agreed to in the amount of $323.56 inclusive of interest.

Mr. Siegel: In order to get the record clear, I take it that what you mean, Mr. Heath, is merely that with reference to the Business Tax claim included in the claim filed and under objection the amount therein claimed should be reduced to the sum of $323.56.

Mr. Heath: We will enter into a written stipulation.

23 Mr. Siegel: I just want to get the record clear as to what the claim is.

Mr. Heath: All right; that is correct.

Mr. Siegel: With reference to the claim of the Sales Tax you are consenting that it be reduced to the sum of $796; is that correct?

Mr. Heath: That is correct.

Mr. Siegel: As far as the trustee is concerned we consent thereto, but we maintain that the City of New York is not entitled to any priority of payment for the alleged Sales Tax. With reference to the Business Tax we concede it is entitled to priority of payment. Is that understood, Mr.

24 Heath?

Mr. Heath: Yes.

Mr. Siegel: Do you concede, Mr. Heath, that this claim is based upon the fact that the bankrupt was a vendor under the statute?

Mr. Heath: That is, the taxes represented by this $796 are taxes imposed by the local sales tax law upon National Studios as a vendor of tangible personal property upon its receipts from the sales of tangible personal property. We concede that.

The Referee: Is there anything else?

Mr. Heath: I would just like to say this: I wonder if we could have the trustee's accountant take the stand just

for the purpose of clarifying one or two questions for the record as to those receipts on which this tax is imposed.

Mr. Siegel: Is that necessary? Tell us what you want to prove, off the record.

(Then followed discussion off the record.)

The Referee: It is stipulated that there is not and has not been in the possession of the trustee any sums collected by the bankrupt on account of sales taxes. Is that all right?

Mr. Siegel: That is all right.

Mr. Heath: All right.

SIDNEY LAUTT, 140 West 170th Street, New York City, called as a witness in behalf of the City of New York, being first duly sworn, testified as follows:

Direct Examination by Mr. Heath:

Q. You are the accountant for the trustee? A. I am employed by the accountant for the trustee.

Q. Who are those accountants? A. Radin & Goldstein.

Q. You are familiar with the books of this bankrupt in possession of the trustee? A. I am.

Q. Can you tell us whether those books show that the bankrupt prior to the filing of the petition in bankruptcy charged sales taxes on its sales on tangible personal property? A. It did.

Q. It entered them in the books of account? A. Yes.

Q. Do you know whether those books show the collection of such sales taxes by the bankrupt? A. I don't know.

Q. Is there any book of the bankrupt that would show that? A. I don't believe there is one book. It may be—the information may be obtained by examining several and connecting them up.

28 Q. From your examination you cannot state one way or the other as to whether the bankrupt collected those taxes? A. At present I can't. I may be able to upon a further examination of the books.

Cross Examination by Mr. Siegel:

Q. Are you a certified public accountant? A. No.

Q. Are you a public accountant? A. Yes.

Q. You examined books on numerous occasions? A. Yes, on occasions.

29 Q. What do the books reflect as being the amount owing for sales tax? A. $154.41.

The Referee: I will take the stipulation on the amount.

Mr. Siegel: That is all right.

The Referee: Next witness.

PHILIP J. GREENBERG, 80 St. Marks Place, Staten Island, New York, called as a witness in behalf of the City of New York, being first duly sworn, testified as follows:

30 Direct Examination by Mr. Heath:

Q. You were the bookkeeper for the bankrupt, Mr. Greenberg? A. Yes, sir.

Q. About what period? A. From about April until the business was closed up.

Q. April of what year? A. 1939.

Q. Are you familiar with the books of the bankrupt? A. Yes, sir.

Q. Did you keep charge of them? A. Yes, sir.

Q. Do you know whether or not city sales tax entries were made in these books? A. City sales tax was set up as a liability. That I know.

Q. When a sale of tangible personal property was made? A. That is right. A separate liability was set up.

Q. In what book? Is the daily journal here? A. That is a sales book. Daily sales were analyzed—daily sales and monthly sales.

Q. Those entries were made prior to the actual receipt of the cash? A. You had to show a certain liability before you collected. Any time an invoice went through the actual charge was sent through and the—let us assume a bill of $5. We set up $5, and ten cents was tax. First the invoices were made up, and then the invoices were entered on this sheet.

Q. Prior to payment? A. Yes.

Q. Do you know whether there was any entry made of sales taxes collected? A. When a customer paid the customer was credited, and the cash receipts was debited. Part of the receipts was tax and part actual merchandise.

By the Referee:

Q. You mean cash was charged for that amount. You credit the customer and charge cash? A. Yes.

By Mr. Heath:

Q. What method was used to show in the books the payment of sales tax to the city? A. There was no separate system of breaking down the receipts as to city sales tax and the actual sale. The check that was collected included both the city sales tax and the actual invoice.

Q. In this record from which the bills and invoices were made up—that record listed the sales tax as charged separately from the sales price? A. Yes, the invoice, yes.

Q. Did you pay city sales taxes based upon that entry? That is what the books reflect, rather than paying the city based upon an entry of sales taxes collected? You paid the city on the basis of sales taxes charged? A. Yes.

Q. As far as you know, there was no record of actual sales taxes collected as sales taxes, is that right? A. You can if you want to do it. It will take a lot of work. You can go through each invoice, and as it was paid you can deduct your sales tax. Those that weren't paid are still outstanding.

Q. On these bills collected the corporation did not keep separately from the rest of the money received that which was earmarked for taxes? A. No, that was put in regular general cash.

35 Q. As a matter of practice, therefore, the corporation would generally have collected the sales taxes, would it not? A. In the regular run of business, yes.

Q. Along with the sales price as listed on the bill or invoice? A. That is right. It was a liability of the customer.

Mr. Heath: That is all.

(Then followed argument off the record.)

The Referee: It is stipulated that the $796 due to the City of New York on account of sales tax is based upon sales made by the bankrupt amounting to $39,800. Of
36 those sales the bankrupt collected $60 taxes on sales amounting to $3,000. On the balance of the sales it collected no tax. Of the tax collected by the bankrupt none of it came into the possession of the trustee.

Is that all right?

Mr. Siegel: Yes, that is all right.

Mr. Heath: All right.

(Then followed argument off the record.)

The Referee: Submit your briefs.

(THE HEARING WAS CLOSED.)

37

Opinion of Referee In Bankruptcy.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	In Bankruptcy, No. 72936. Referee's Opinion on Objection to Claim of City of New York.

38

On March 21, 1939 the City of New York filed a claim asserting that the bankrupt is justly and truly indebted to the City of New York for taxes in the total amount, including interest, of $3,890.37. It asserts that this is for sales taxes over periods beginning December 10, 1934 and ending January 10, 1939. It was stipulated that the total claim for sales taxes be compromised for the amount of $796; that of this amount the bankrupt failed to collect from its vendees the sum of $736; that the bankrupt did collect the remaining $60 from its vendees; that no part of this $60 was received by the trustee. The trustee objects to the allowance of this claim as a priority tax claim and contends that it is allowable only as a general claim.

39

BENJAMIN SIEGEL, Esq., For the Trustee.

WILLIAM C. CHANLER, Esq.,
By M. L. Heath, Esq.,
Of Counsel, For the City of New York.

40 *Opinion of Referee in Bankruptcy.*

STEPHENSON, Referee:

Since the total amount of the claim has been compromised for $796 without allocation of parts thereof over any of the periods between December 10, 1934 and January 10, 1939 it cannot be determined which one of the various local sales tax laws applies. Local Law No. 21 for the year 1938 which took effect on July 1, 1938 provides in Section N41-2.0, subdivision 4-d thereof, that "the vendor shall be liable for the collection thereof and for the tax". If this law applied to the whole claim of the City of New York I should have no
41 doubt that the bankrupt is liable for a tax as he is made so liable by the express words of the statute. But since it cannot be assumed that the bankrupt made the sales for which the City asserts its claim after July 1, 1938 it cannot be held that Local Law No. 21 for the year 1938 is applicable to the claim of the City of New York.

The previous local laws applicable are No. 24 for the year 1934 and No. 20 for year 1937. These laws have no provision similar to the provision above quoted in Local Law No. 21 for the year 1938. The question is whether under these laws the vendor's liability is a liability only as a collector of taxes for the City of New York. By the Chandler Act,
42 which applies in this case since the petition was filed after that Act became effective, "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof" are given a priority. The priority given by the previous Act to debts due a State or any subdivision thereof which by the laws of such State are given priority no longer exists under the Chandler Act. It is therefore essential to determine whether the claim of the City of New York is a claim for a tax legally due and owing by the bankrupt or whether it is a claim against the bankrupt only as a collector of such taxes.

The provisions of Local Law No. 24 for the year 1934 and Local Law No. 20 for the year 1937 provide that every vendor is to file with the Comptroller a return of his re-

ceipts and of the taxes payable thereon and that at the time of filing a return of receipts each vendor shall pay to the Comptroller the taxes imposed by these local laws upon the receipts required to be included in such return and that all taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the Comptroller without regard to whether a return is filed or whether the return correctly shows the receipts and the taxes due thereon. It is further provided as follows:

> "Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same."

An additional remedy is provided by the issuance of a warrant to levy upon and sell the real and personal property of the vendor or purchaser for the payment of the amount of the tax. These provisions of the law impose two liabilities upon the vendor: one is to collect the tax from the vendee and pay it to the City; the other liability is to pay the City the amount of the tax whether the vendor collects it or not. This latter obligation is a tax legally due and owing by the bankrupt. Such was the reasoning of the Court in *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51, and since the claim of the City of New York expressly claims that the bankrupt is justly and truly indebted to it for taxes the claim is entitled to priority.

Had the City of New York elected to claim for the vendor's liability as its collection agent its claim could have been allowed only as a general claim. The objection of the trustee is therefore overruled and the claim allowed as a tax claim entitled to the priority granted by Section 64 (a) of the Bankruptcy Act. Settle order on notice.

Dated, New York, June 6, 1940.

46

Order of Referee, Filed June 18, 1940.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	No. 72936

47

The City of New York, having filed with the Referee on March 21, 1939, a proof of claim alleging that the bankrupt is justly and truly indebted to the City of New York for sales taxes which accrued over the period beginning December 10, 1934 and ending January 10, 1939, under Local Laws No. 20 of 1934, as amended, No. 29 of 1935, No. 31 of 1936, No. 20 of 1937, as amended, and No. 21 of 1938, in the amount of $3,359.71, principal, and $530.66, interest, or $3,890.37, total, and for business taxes which accrued during the period 1933-1938, under Local Laws No. 9 of 1934, No. 17 of 1934, as amended, No. 32 of 1935, No. 29 of 1936, No. 22 of 1937 and No. 20 of 1938, in the amount of $589.98, principal, and the Trustee, by notice of motion dated February 17, 1940 and petition verified February 15, 1940, having moved for an order expunging said proof of claim of the City of New York and adjudging that said proof of claim is not entitled to priority of payment, and after hearing Benjamin Siegel, Esq., attorney for the Trustee, in support of the motion and William C. Chanler, Esq. (Morris L. Heath, of counsel) in opposition thereto, and the parties having stipulated in open Court that the amount of business taxes alleged to be due in said proof of claim be re-

48

duced to $323.56, and the amount of sales taxes alleged to be due in said proof of claim be reduced to $796.00, which amount of sales taxes is due from the bankrupt as a vendor at retail of tangible personal property, and consists of the sum of $736.00 that the bankrupt failed to collect from its vendees and $60.00 that the bankrupt did collect from its vendees, but no part of which was received by the Trustee, and due deliberation having been had and the opinion of the Referee having been filed,

Now, it is hereby:

ORDERED, that the claim of the City of New York for sales taxes herein be, and the same hereby is, allowed as a claim entitled to priority under Section 64a(4) of the Bankruptcy Act as amended by the Chandler Act in the sum of $796.00, and it is further

ORDERED, that the claim of the City of New York for business taxes be, and the same hereby is, allowed as a claim entitled to priority under Section 64a(4) of the Bankruptcy Act as amended by the Chandler Act in the sum of $323.56, and it is further

ORDERED, that interest on the aforesaid claims of the City of New York be, and the same hereby is, allowed at the rate of 6% per annum from April 1, 1940, the date of the stipulation of the parties in open Court agreeing to the amounts of the respective claims.

Dated, June 17, 1940.

R. P. STEPHENSON,
Referee in Bankruptcy.

52

Trustee's Petition for Review.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	No. 72936 Petition to Review Order of the Referee.

53

TO HONORABLE ROBERT P. STEPHENSON, REFEREE IN BANKRUPTCY:

The petition of Michael Feiring respectfully shows to this Court and alleges:

1. That petitioner is the Trustee in Bankruptcy herein, duly qualified and now duly acting as such.

2. That in the course of the proceedings herein an order was duly made and entered herein by Hon. Robert P. Stephenson, Referee in Bankruptcy herein, on the 17th day of June, 1940.

54

3. Annexed hereto, marked Exhibit "A" and made part hereof is a true copy of said order.

4. That said order was and is erroneous in that:

(a) It is contrary to the evidence adduced and the weight of the evidence.

(b) It is contrary to law.

(c) The Referee erred in allowing the claim of the City of New York for sales tax as a priority claim against this estate under Section 64a of the Bankruptcy Act and in overruling the objection of the Trustee filed to said claim.

(d) The Referee erred in holding that the claim of the City of New York was for a tax due and owing by the bankrupt.

(e) That the Referee erred in failing to find that the claim of the City of New York was for a debt due and owing by the bankrupt to the City of New York.

WHEREFORE, petitioner feeling aggrieved because of said order prays that the same be reviewed as provided in Section 39c of the Bankruptcy Act and the amendments thereto.

Dated, New York, June 19th, 1940.

MICHAEL FEIRING,
Petitioner.

City, County and State of New York, ss.:

MICHAEL FEIRING, being duly sworn, deposes and says; that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

MICHAEL FEIRING.

Sworn to before me this
19th day of June, 1940.

DAVID N. WEISBAND,
Notary Public.
Kings Co. Clk. No. 325, Reg. No. 1061.
N. Y. Co. Clk. No. 189, Reg. No. 1-W-169.
Commission expires March 30, 1941.

58

Exhibit "A"

(Order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 17, 1940—printed in record on page 16.)

Referee's Certificate on Petition for Review.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

59

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	In Bankruptcy, No. 72936. Referee's Certificate on Petition to Review Referee's Order.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

60

Pursuant to the Petition to Review herein, I Hereby Certify the following to this Court:

1. Petition to Review of Michael Feiring, the trustee herein, verified June 19, 1940;

2. Order of the Referee, dated June 17, 1940, to be reviewed by this Petition;

3. Petition of Michael Feiring, trustee herein, verified February 15, 1940, and notice of motion dated February 17, 1940;

Referee's Certificate on Petition for Review.

4. Claim of the City of New York, sworn to March 20, 1939;

5. Transcript of the evidence;

6. Referee's opinion dated June 6, 1940;

The question presented is whether or not the Referee erred in making the order to be reviewed herein.

Respectfully submitted,

Dated, New York, June 21, 1940.

R. P. STEPHENSON,
Referee in Bankruptcy.

To Be Placed on Bankruptcy Motion Calendar for Hearing on Wednesday, June 26, 1940, at 10:30 A. M. Notice Thereof Given by Mail to: Benjamin Siegel, attorney for Trustee, 280 Broadway, New York City; and William C. Chanler, Corporation Counsel for City of New York, Municipal Building, New York City.

64

Opinion of John W. Clancy, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	No. 72936

65

OPINION

CLANCY, D. J.:

The City of New York has filed a claim for Sales Tax against this bankrupt which was stipulated to be Seven hundred ninety-six ($796.00) Dollars, Sixty ($60.00) Dollars of which the bankrupt had collected from its customers but failed to pay to the City, and the rest representing the sum computed on its sales which the bankrupt failed to collect from its customers. The Referee granted priority to the claim and the trustee appeals. The City's claim
66 covers the period from 1934 to 1938 and the Referee notes that the 1938 law, which took effect on July 1 of that year, provides that "the vendor shall be liable for the collection thereof and for the tax", language not found in the earlier local laws under which the Sales Tax is imposed. We do not think the stated language of the 1938 statute, torn from its setting in the law, or the issue of time has importance in this decision.

In *Matter of Laznroff*, 84 F. (2d) 982, the Court describes the City's contention there as follows: "That its claim against the vendor is entitled to priority under Section 64B (6) or (7) of the Bankruptcy Act as being both a claim

'for taxes due and owing by the bankrupt to the City of New York or a claim by a person who, under the Laws of the State of New York, is entitled to a priority.'" The Court held that the claim was "not a tax entitled to a priority under Section 64B (6) nor a debt covered by the State Law under Section 64B (7) of the Bankruptcy Act", and priority was denied the claim. Certiorari was denied by the Supreme Court, 299 U. S. 583. When this decision was handed down, the Bankruptcy Act, Section 64B (7) gave priority to "debts owing to any person who, by the Laws of the States or the United States, is entitled to priority". In December, 1938, the Court of Appeals decided the *Matter of Atlas Television Co.*, 273 N. Y. 51. They noticed the *Matter of Lazaroff*, supra; said that the vendors obligation is "in the nature of a tax" stated the vendor's obligation under the local law; concluded that the City was sovereign when it collected the obligation imposed by its local Sales Tax Law on its inhabitants and concluded finally: "If the City has no priority in collecting the claim founded on this application, the other creditors of the vendor share in the money collected by the vendor for payment to the City. Fine-spun distinctions are here out of place. The local law provides that 'vendor shal pay the tax' and the City is entitled as sovereign to priority for such payment." The Court gave the City's assessment and levy under the local Sales Tax Law the character of the action of a sovereign by holding that the City acts as a sovereign when it "imposed the obligation * * * and when it collects that obligation" and concluded that since the sovereignty has a preference in collection without statute (*Matter of Carnegie Trust Co.*, 206 N. Y. 390) priority attaches to the City's claim. In *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, the Court of Appeals adverted to its decision in the *Atlas Television* case and said that "that decision did not hold that the Sales Tax is imposed on the vendor

but only that he is under a duty to pay the tax to the City whether or not the vendor collects from the purchaser." This was stated by the Court as a complete answer to the contention that the appellant put forth that it was taxed twice on its gross receipts; once by the sales tax and once by the utility tax. Even more clearly in *Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, the same Court held the Sales Tax did not fall on the vendor. The equities of that case stirred a strong dissenting opinion, the language of which shows that the majority considered the *Atlas Television* and held
71 that the Court had never decided that the incidence of the Sales Tax was on the vendor.

We have cited *Merchants Refrigerating Co.* v. *Taylor* and *Kesbec Inc.* v. *McGoldrick* at this point to emphasize what the Court of Appeals actually held in the *Atlas Television* case. The decision was only an affirmative answer to the question certified by the Appellate Division which was: "Is the claim of the City for sales tax which the assignor was obligated to pay entitled to a preference in the case of a general assignment?" The Appellate Division had vouchsafed no opinion when it decided the case (248 A. D. 853) so we have no basis for expanding or defining the sense of
72 its simple question nor for conjecturing the subject matter of its doubts.

After that decision, the City of New York again applied for certiorari of the Lazaroff decision. The Court had, as we have stated, once denied certiorari, indicating its agreement with the Circuit Court. It now granted certiorari and said: "The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. Re *Atlas Television Co.*; 273 N. Y. 51." This later application for certiorari by the City was based on two grounds; one that a vendor's obligation to pay the City sums collected from purchasers, pursuant to

the Sales Tax Law was a tax and not a debt, and, two, that the City was a person, who, by the laws of the States, is entitled to priority under Section 64B(7) of the Bankruptcy Law as it then stood. In its petition for certiorari, the City said: "In view of the opinion in the *Atlas Television* case just referred to us, petitioner submits that the opinion of the Circuit Court of Appeals, Second Circuit, in the instant case is clearly wrong on both points decided and it is out of harmony with the law of the State as laid down by this Court of last resort. Your petitioner desires to point out, moreover, that even if the decision of the State Court on whether the claim is or is not a tax be deemed binding on the Bankruptcy Court, still the decision of the State Court, that the 'City is a person who, by the laws of the State is entitled to priority' is very definitely binding on the Bankruptcy Court by § 64B(7) of the National Bankruptcy Act."

The only conclusion which a District Judge logically can derive from this history which we have set forth at length is that the Supreme Court reversed the *Lazaroff* case solely on the state court's determination, as a matter of State Law, that the amount collected by the vendor, pursuant to the provisions of the local Sales Tax Law, and in his hands, or uncollected by him and due from him—as an insurer, the Court said in *McGoldrick* v. *Berwin-White Co.*, 309 U. S. 33, at 43,—was a debt entitled to priority by the Law of New York State and, therefore, entitled to priority under § 64B(7) of the Bankruptcy Act as it then stood. In expounding this argument in the *Atlas Television* case, the court used somewhat indefinite language because the argument required generalization. Whatever vice can be made to appear in it was cured by its own effort in *Merchants Refrigerating Co.* v. *Taylor*, supra, and *Kesbec, Inc.* v. *McGoldrick*, supra. Further, the Supreme Court has concluded

that the New Sales Tax is a tax on the purchaser. *McGoldrick* v. *Berwin-White Co.*, supra. While that conclusion was possibly unnecessary to its decision in that case, it was of importance in its exposition. We, therefore, may not conclude that it had any other idea when it reversed the *Lazaroff* case. We think the conclusion we have reached is the only one consonant with the original denial of certiorari by it in the *Lazaroff* case and the subsequent grant of the writ and reversal following the *Atlas Television* decision and with its subsequently expressed opinion.

77 The present Bankruptcy Law, Section 64(5) accords priority only to debts to which it is given by the Laws of the United States, so that the claim of the City against this bankrupt for unpaid Sales Taxes now has no priority. *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859; *General Merchandising Co.*, 32 Fed. Supp. 805.

Dated: New York, N. Y., August 8, 1940.

JOHN W. CLANCY (Signed),
United States District Judge.

78

Order of Clancy, D. J., Dated August 16th, 1940, Appealed From. 79

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 16th day of August, 1940.

Present: Hon. JOHN W. CLANCY, District Judge.

80

IN THE MATTER of NATIONAL STUDIOS, INC., Bankrupt.	Order Granting Petition to Review No. 72936

Michael Feiring, Trustee herein, having duly filed a petition to review the order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 17th, 1940, allowing the claim of The City of New York for Sales Tax in the sum of $796.00 as a claim entitled to priority under Section 64a(4) 81 of the Bankruptcy Act, and the Referee having thereafter duly issued a certificate on said petition to review, and same having duly come on for hearing before the undersigned on the 24th day of July, 1940.

Now, upon reading and filing the certificate of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated June 21st, 1940, together with the exhibits and documents referred to therein, and after hearing Benjamin Siegel, attorney for the Trustee, by Benjamin Brownstein, of counsel, in support of said petition to review, and William C. Chanler, Esq., Corporation Counsel of the City of New York, in

opposition thereto, by Morris L. Heath, Esq., of counsel, and upon filing the opinion of the undersigned dated August 8th, 1940, and due deliberation having been had thereon, and good and sufficient reason appearing therefor, it is

On motion of Benjamin Siegel, attorney for the Trustee herein,

ORDERED, that said petition to review be and the same is hereby in all respects granted, and the aforesaid order of Hon. Robert P. Stephenson, Referee in Bankruptcy, dated
83 June 17th, 1940, be and the same is hereby reversed; and it is further,

ORDERED, that the claim of The City of New York for Sales Taxes herein be and the same is hereby allowed as a general claim against this estate in the sum of $796.00; and it is further

ORDERED, that the claim of The City of New York for Business Taxes be and the same is hereby allowed as a priority claim against this estate in the sum of $323.56 with interest thereon at the rate of 6% per annum from April 1st, 1940.
84

JOHN W. CLANCY,
U. S. D. J.

Notice of Appeal.

85

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
of
NATIONAL STUDIOS, INC.,
Bankrupt.

86

Notice is hereby given that the City of New York, claimant, hereby appeals to the Circuit Court of Appeals for the Second Circuit from that part of the order in this action, dated August 16, 1940 and entered on September 24, 1940, which reverses the order of Honorable Robert P. Stephenson, Referee in Bankruptcy, dated June 17, 1940, according priority to the claim of the City of New York for sales taxes in the sum of $796.00, and directs that the same be allowed as a general claim against the estate herein.

Dated, September 28, 1940.

Yours, etc.,

87

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

To:

CLERK OF THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN SIEGEL, Esq.,
Attorney for Trustee,
280 Broadway,
Borough of Manhattan,
City of New York.

88

Stipulation Waiving Bond for Costs.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

NATIONAL STUDIOS, INC.,

Bankrupt.

No. 72936

89

IT IS HEREBY STIPULATED AND AGREED that the City of New York is not required to file a bond for costs on the appeal taken by the City of New York in this matter to the Circuit Court of Appeals for the Second Circuit from the order in this action dated August 16, 1940 and entered on September 24, 1940.

Dated, September 28, 1940.

BENJAMIN SIEGEL,
Attorney for Trustee.

90

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Claimant-Appellant.

Stipulation as to Contents of Record.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

IN THE MATTER

of

NATIONAL STUDIOS, INC.,
Bankrupt.

THE CITY OF NEW YORK,
Claimant-Appellant,

against

MICHAEL FEIRING, Trustee in Bankruptcy,
Appellee.

IT IS HEREBY STIPULATED AND AGREED that instead of serving designations as provided by Rule 75 (a) of the Rules of Civil Procedure, the parties to this appeal hereby agree, in accordance with Rule 75(f) of the Rules of Civil Procedure, that the following enumerated papers comprise the complete record and all the proceedings and evidence in this matter and constitute the papers to be printed in the Record on Appeal herein:

1. Statement under Rule 13.

2. Notice of hearing on Trustee's objection to claim of the City of New York dated February 17, 1940, and Trustee's supporting petition, dated February 15, 1940.

94 *Stipulation as to Contents of Record.*

3. Minutes of hearing held before Hon. Robert P. Stephenson, Referee, on April 1, 1940.

4. Opinion of Hon. Robert P. Stephenson, Referee, dated June 6, 1940.

5. Order made by Hon. Robert P. Stephenson, Referee, dated June 17, 1940.

6. Trustee's petition to review, dated June 19, 1940.

7. Referee's certificate on petition to review, dated June
95 21, 1940.

8. Proof of claim of City of New York, dated March 20, 1939.

9. Opinion of Hon. John W. Clancy, District Judge, dated August 8, 1940.

10. Order made by Hon. John W. Clancy, District Judge, dated August 16, 1940, and entered September 24, 1940.

11. Notice of Appeal of City of New York, dated September 28, 1940 and filed October 3, 1940.

12. Stipulation waiving bond for costs, dated September
96 28, 1940.

Dated, October 25, 1940.

BENJAMIN SIEGEL,
Attorney for Trustee.

WILLIAM C. CHANLER
Corporation Counsel,
Attorney for City of New York,
Claimant-Appellant.

97

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* NATIONAL STUDIOS, INC., Bankrupt.	Stipulation on Appeal Record

98

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the complete record and all the proceedings and evidence in the District Court in the above-entitled cause.

Dated, November 6th, 1940.

BENJAMIN SIEGEL,
Attorney for Trustee.

99

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Claimant-Appellant.

100

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

NATIONAL STUDIOS, INC.,

Bankrupt.

101

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, on the 6th day of November, in the year of our Lord One thousand nine hun-
102 dred and forty and the independence of the United States One hundred and sixty-four.

GEORGE J. H. FOLLMER,
Clerk.

In United States Circuit Court of Appeals for the Second Circuit, October Term, 1940

No. 171

(Argued January 15, 1941. Decided March 17, 1941)

In the Matter of National Studios, Inc., Bankrupt

The City of New York, Claimant-Appellant,

against

Michael Feiring, Trustee in Bankruptcy, Appellee

Appeal from an order of the District Court for the Southern District of New York denying priority to a claim filed against the estate of a bankrupt. Affirmed.

Before Swan, Chase and Clark, Circuit Judges

Benjamin Siegel, Attorney for Trustee-Appellee.

William C. Chanler, Corporation counsel, Attorney for Claimant-Appellant; Paxton Blair, Sol Charles Levine and Morris L. Heath, of Counsel.

Opinion

Chase, Circuit Judge:

The City of New York filed its claim against the estate of National Studios, Inc., a bankrupt, adjudicated in the District Court for the Southern District of New York, for taxes on sales of tangible personal property imposed by local laws for the period beginning December 10, 1934 and ending January 10, 1939. Priority was claimed under Sec. 64 (a) (4) of the Bankruptcy Act and the claim, the amount of which has been adjusted by agreement and stipulated, was granted priority by the referee and so allowed. On review the district court denied priority and this appeal raises only that issue. It was also stipulated that only part of the amount of the claim was for taxes actually collected by the bankrupt from its vendees; the remainder being for what the bankrupt failed to collect though required so to do.

The local laws involved are known as No. 20 of 1934, as amended; No. 29 of 1935; No. 31 of 1936; No. 20 of 1937 and No. 21 of 1938. Whether or not the claim is entitled

to priority depends upon whether under their provisions the bankrupt was liable to the City as a taxpayer who owes a tax or as a tax collector who owes as a debt the amount of taxes collected or to be collected. Nolte v. Hudson Nav. Co., 8 F. (2d) 859 (C. C. A. 2); United States v. Balt. & Ohio R. R. Co., 17 Wall. 322; Commonwealth of Pennsylvania v. York Silk Mfg. Co., 192 Fed. 81; In re Goldstein, 13 Fed. Supp. 991; In re Waller, 142 Fed. 883. These local laws are all substantially alike except that the 1938 law, which became effective on July 1, in that year contained the phrase "the vendor shall be liable for the collection thereof and for the tax" which was new language but merely stated more concisely what was the effect of the prior laws and the appellant does not rely upon that change for any distinction between what is due under the 1938 law and the ones previously in effect.

The first law which is Local Law No. 20 of 1934 (erroneously given number 21 in the compilation published at Albany) as amended by Local Law No. 24 (erroneously numbered 25 in the compilation) is typical of all and the entire claim will be treated as though it were based on taxes assessed thereunder.

In section 2 a tax is imposed under receipts from every sale of tangible personal property sold at retail in the City of New York and it is provided that the tax shall be stated and charged separately from the sale price when the sale is made or evidence of it issued and "shall be paid by the purchaser to the vendor for and on account of the City of New York, and the vendor shall be liable for the collection * * *." The vendor is given the same right in respect to the collection of the tax from the purchaser "as if the tax were a part of the purchase price of the property * * * and payable at the time of the sale." In section 4 the vendor is required to keep records of receipts from sales and of the taxes payable thereon and in section 5 the duty is placed upon him to file returns quarterly or otherwise as the comptroller may permit or direct. Section 6 deals with the payment of the taxes. It provides that each vendor shall, at the time of filing a return pay the taxes to the comptroller upon the receipts required to be included in such return and that all taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller whether or not a return is filed and whether or not, if filed, the return

is correct. The comptroller is empowered to compel "any vendor required to collect the tax imposed by this local law" to furnish an approved bond "to secure the payment of any tax and/or penalties due or which may become due from such vendor," or require a deposit to be made in lieu of the filing of a bond. Section 7 relates to the procedure for determining the amount due and section 8 provides that "whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law, as in this local law provided, the corporation counsel shall, upon request of the comptroller, bring an action to enforce the same." An alternative remedy against both the vendor and purchaser by levy upon property is also provided. And in section 3 the Comptroller is authorized to relieve the vendor from the duty of collecting the tax from the purchaser on small sales and to the extent that taxes are payable on that score we reserve decision as this record does not show that any such taxes were claimed. Whenever the vendor failed to collect the taxes from the purchaser as the law required, the taxes were made payable also by the purchaser directly to the Comptroller but in all other instances the vendor was alone made liable for their payment to the Comptroller; the duty of the purchaser being to pay the vendor.

We first had occasion In re Lazaroff, 84 F. (2d) 982 to decide whether this local law imposed upon the vendor taxes which should be allowed as a prior claim against the estate of a bankrupt vendor and held that it did not. We also held that no debt was thereby created which was entitled to priority because accorded priority in payment under state law. Certiorari was at first denied. New York City v. Goldstein, Trustee, 299 U. S. 583. Following that, the New York Court of Appeals held in Matter of Atlas Television Co., 273 N. Y. 51 that where a general assignment for the benefit of creditors was made under state law a claim of the City of New York for sales taxes was entitled to priority. At that time, though not now, a claim given priority under state law was entitled to priority under the Bankruptcy Act and certiorari was then granted in In re Lazaroff, supra, with the result that our decision was reversed on the authority of Matter of Atlas Television Co., supra. New York City v. Goldstein, Trustee in Bankruptcy, 299 U. S. 522. Apparently it was not held in the Atlas Television case that it was necessary to be entitled

to priority under state law that the claim be one for taxes imposed upon the vendor. As it was based upon an obligation making the vendor liable for the payment to the city which exercised sovereign power in creating the obligation, priority did not depend upon whether the vendor or the purchaser was taxed. So long as the vendor was bound to pay whether he collected the tax from the purchaser or not a claim based upon his default in the payment of whatever might be due the city on account of such taxes was to be given priority upon the principle that the sovereign is to be given a preference over other creditors in insolvency proceedings. Matter of Carnegie Trust Co., 206 N. Y. 390. Decision in the Atlas Television case did not necessarily depend upon the actual taxation of the vendor for the issue was broadly one of priority only and that it was not based upon any holding that the vendor was made liable for taxes as such is made even clearer by later decisions of the same court. Kesbec, Inc. v. McGoldrick, 278 N. Y. 293; Merchants Refrigerating Co. v. Taylor, 275 N. Y. 113. In the opinion in the last mentioned case it is said in reference to the Atlas Television case that "that decision did not hold that the Sales Tax is imposed on the vendor but only that he is under a duty to pay the tax to the City whether or not the vendor collects from the purchaser."

For the reasons stated, we think our decision in In re Lazaroff, supra, in so far as it held that such a claim as that here presented was not entitled to priority under the Bankruptcy Act as one for taxes legally due and owing by the bankrupt to the subdivision of a state was not changed by the decision in New York City v. Goldstein in Bankruptcy, 299 U. S. 522; and the district court correctly treated it as the law in this circuit. See also, McGoldrick v. Berwin-White Co., 309 U. S. 33; Gulf Oil Corporation v. Grady, 110 F. (2d) 178 (C. C. A. 2).

Order affirmed.

Clark, C. J. dissents with memorandum.

DISSENTING OPINION

CLARK, Circuit Judge (dissenting):

I think the amendment of Bankruptcy Act, § 64, sub. a, by the Chandler Act did not lessen the force of New York City v. Goldstein, 299 U. S. 522, for that upheld the city's claim to priority by merely citing In re Atlas Television Co.,

273 N. Y. 51, 6 N. E. 2d 94, which had sustained a like priority in state assignment proceedings expressly upon the ground that it was a tax claim. In the Atlas case the court rejected any other basis for priority on the authority of Matter of Northern Bank of New York, 163 App. Div. 974, 148 N. Y. S. 70, affirmed 212 N. Y. 608, 106 N. E. 749, and then said of our decision in Matter of Lazaroff, 2 Cir., 84 F. 2d 982 (reversed in New York City v. Goldstein, supra), which had denied priority: "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. * * * We must look to the substance of the obligation. From that point of view it seems clear that the city is entitled to a priority. It has imposed a tax as sovereign and to meet a need which concerns the welfare of the state. It has provided that the vendor of property must pay the tax to it. * * * The local law provides that the 'vendor shall pay the tax,' and the city is entitled as sovereign to priority for such payment."

This seems to me clear enough; I do not believe its force is impugned by later analyses of the ultimate incidence of the tax—as on the purchaser—to avoid claims of double or extraterritorial taxation, Merchants Refrigerating Co. v. Taylor, 275 N. Y. 113, 124, 9 N. E. 2d 799; McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, or the windfall of a refund of a tax improperly collected. Kesbec, Inc. v. McGoldrick, 278 N. Y. 293, 16 N. E. 2d 288.

In actual fact the obligation of the vendor has all the characteristics of a tax: an absolute duty to pay, regardless of his failure to collect; a liability for all taxes, even though he need not collect on sales less than 12 cents (as established by the Comptroller's Regulations authorized by the law); and enforcement against him by suit or tax distraint. I do not see why this is not properly a tax levy against both vendor and purchaser, as seems the city's obvious intent, certainly so far as remedies are concerned. But whomever this tax is said to be "on," it is evident that when it is not paid, the vendor will generally be the one proceeded against; and in that event he shall pay "the tax." I do not believe his bankruptcy changes its character. Compare Barbee, Trustee v. Oklahoma Tax Commission, 10 Cir., 103 F. 2d 114, affirming In re Kanaly, D. C. Okl., 23 F. Supp. 995; 18 N. Y. U. L. Q. Rev. 135; 40 Col. L. Rev. 1241, 1245.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

In the Matter of NATIONAL STUDIOS, INC., Bankrupt

THE CITY OF NEW YORK, Appellant

JUDGMENT—Filed March 19, 1941

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 14, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BLANK PAGE

BLANK PAGE

FILE COPY

(2843)

Supreme Court of the United States

No. 863 October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FRIEDEL, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Whether upon the bankruptcy of a retailer who has, or should have, collected sales taxes from customers and who should have forwarded them to the Comptroller of the City of New York, the sums found owing by the bankrupt are owed to the City qua debt or qua tax. City contends that New York Court of Appeals has held that they are owed qua tax, and that contrary holding of majority of Court below is highly prejudicial to its efforts to secure revenues with which to meet emergency. Under similar state laws, opposite result was reached in Tenth Circuit and in Courts of last resort of other States. Construction of 1938 Amendments to National Bankruptcy Act.

March 21, 1941.

WILLIAM C. CHANLER,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

BLANK PAGE

INDEX

Table of Cases Cited.

Other Authorities.

BLANK PAGE

Supreme Court of the United States

No. . October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,
against
MICHAEL FEHRING, Trustee in Bankruptcy of
NATIONAL STUDIOS, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. In a certain proceeding in bankruptcy in the United States District Court for the Southern District of New York, commenced in 1939 and known as *In re National Studios, Inc.*, claims were duly filed by your petitioner, and also by other claimants whose interests are not presently relevant. The respondent is the trustee in bankruptcy of National Studios, Inc., and the custodian of such assets as are available for the payment of creditors.

3. The bankrupt sold certain goods at retail to its customers, and was required by the New York City Sales Tax Local Law (Local Law No. 24 of 1934, as amended and con-

tinued by divers local laws annually passed—the text of the law being printed in the Appendix, *post*, p. 25) to collect from its customers a 2% sales tax on each purchase.

4. The sum originally demanded as sales taxes which the bankrupt should have collected from its customers was reduced by compromise, and by stipulation at the hearing (R., 12), to $796. Of this sum the bankrupt had collected $60 only from its customers, and even this sum had not been segregated and could not be traced into the possession of the trustee (R., 12).

5. The National Bankruptcy Act, § 64, as amended by 52 Stat. 840, 874, awards priority in bankruptcy to "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *." A provision formerly forming part of this section and awarding priority (after taxes) to "debts owing to any person who by the laws of the States or the United States is entitled to priority" was modified by striking out the words "the States or," so that it possesses no present pertinence.

6. The referee in bankruptcy held that the City's claim against a retailer, such as the bankrupt was, for sums of money which were or ought to have been collected by way of sales taxes from its customers, was a claim for taxes. The sums which the bankrupt owed, he held, were owed *qua* tax and not *qua* debt. He allowed the claim priority.

7. The District Court reversed the referee and said the sums owed were owed *qua* debt and not *qua* tax.

8. The Circuit Court of Appeals affirmed the District Court, CHASE, J., with whom SWAN, J., concurred writing the prevailing opinion. CHARLES E. CLARK, J., wrote a dissenting opinion. The decision was handed down on March 17, 1941.

Jurisdiction and Timeliness.

9. The petition is made under U. S. Code, tit. 28, § 347, subd. (a), and the Court has jurisdiction to grant the writ. *New York City* v. *Goldstein, Trustee in Bankruptcy,* 299 U. S. 522 (1937).

10. Since the decision of the Circuit Court of Appeals was handed down on March 17, 1941, the order of affirmance being entered March 19, 1941, the petition is timely.

11. The record remains in the custody of the Clerk of the United States Circuit Court of Appeals. The mandate issued forthwith, Rule 30 of the Rules of the Circuit Court of Appeals, Second Circuit, being waived by stipulation.

Statutes Involved.

12. The City Sales Tax Local Law is printed in the Appendix, *post,* p. 25. We show in the subjoined brief our reasons why we say this local law impresses upon the obligation of the bankrupt retailer the characteristics of a *tax* rather than a *debt.*

13. The pertinent portion of the National Bankruptcy Act will be found in Par. 5, *supra.*

Opinions Below.

14. Four opinions merit the attention of this Court, *viz.,* that of the Referee, that of the District Court, that of the majority of the Circuit Court of Appeals, and that of the dissenting Judge.

(i)

The Referee stated that the case presented to him in the City's proof of claim and the Trustee's objections there-

to required him "to determine whether the claim of the City of New York is a claim for a tax legally due and owing by the bankrupt or whether it is a claim against the bankrupt only as a collector of such taxes" (R., 14). He then adverted to the requirement in the local law that every vendor is to "file with the comptroller a return of his receipts and of the taxes payable thereon" (§ 5, R., 14, 15); thereafter quoted the first paragraph of § 8, set forth *post*, p. 27; and finally cited the right to order the sheriff to make a distraint, also set forth *post*, p. 28. He concluded (R., 15):

> "These provisions of the law impose two liabilities upon the vendor: one is to collect the tax from the vendee and pay it to the City; the other liability is to pay the City the amount of the tax whether the vendor collects it or not. This latter obligation is a tax legally due and owing by the bankrupt. Such was the reasoning of the Court in *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51, and since the claim of the City of New York expressly claims that the bankrupt is justly and truly indebted to it for taxes the claim is entitled to priority."

(ii)

The District Judge cited (R., 23-24) three decisions of the New York Court of Appeals on the nature of the seller's obligations under the sales tax local laws: *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936); *Matter of Merchants Refrigeration Co.* v. *Taylor*, 275 N. Y. 113, 124 (1937); and *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 (1938). From these he concluded that the sales tax local law imposes a duty on the vendor to forward collections to the City but does not impose the burden of the tax *qua* tax upon him. He also cited *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), as holding the tax was on the purchaser since it was held not to burden a seller engaged

in interstate commerce.* He concluded that when the decision of this Court in *Matter of Lazaroff*, 84 F. (2d) 932 (2nd Circ., 1936), was reversed *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937), upon the authority of *Matter of Atlas Television Co., supra*, this Court upheld the City's asserted priority because the bankrupt owed a debt to the City under the National Bankruptcy Act, U. S. Code, tit. 11, § 104(7) and did not owe a tax under § 104(6); so that the amendment of 1938 (52 Stat. 874) stripping debts owing to cities of any right to priority compels the City to show that vendors owe sales taxes (collected or collectible from their customers) *qua* taxes and not *qua* debts. This, he said, the City cannot do. He accordingly reversed the Referee.

(iii)

Judge CHASE, with whom Judge SWAN concurred, held that when *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), was decided, the City had priority under state law regardless of whether its claim against a retailer was a claim for a tax or a claim for a debt. The Circuit Court of Appeals had, prior to that decision, held that such a claim was one for a debt. *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936). This Court reversed that decision on the authority of the *Atlas* case, *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937). But this Court, said Judge CHASE, did not disapprove of so much of the *Lazaroff* opinion as held the claim to be a debt and not a tax, since the City, under the National Bankruptcy Act as it then stood, was entitled to prevail whichever way the claim was categorized. This was error, as we show *post*, p. 20. The

* As we show *post*, p. 19, we are not in any sense going back on the position we took at the bar of this Court in the *Bernind-White* case.

Court, therefore, renewed and reiterated the declarations it had made in *Matter of Lazaroff, supra,* as well as in *Nolte* v. *Hudson Navigation Co.,* 8 F. (2d) 859 (2nd Circ., 1925), that sums owed by retailers, for taxes collected of collectible from their customers, are owed *qua* debt and not *qua* tax.*

(iv)

Judge CLARK dissented, and pointed out that in the *Atlas* opinion the New York Court of Appeals had expressly criticized the *Lazaroff* opinion as reflecting an erroneous interpretation of New York law, and as denominating a *debt* what was really, in the judgment of the New York Court of Appeals, a *tax.*

Judge CLARK also referred to a holding in the Tenth Circuit that what the retailer owes in circumstances like those at bar is owed *qua* tax and not *qua* debt. *Barbee, Trustee* v. *Oklahoma Tax Commission,* 103 F. (2d) 114 (10th Circ., 1939). Two law review notes to the same effect (18 N. Y. Univ. Law Q. Rev. 135; 40 Columbia L. Rev. 1241) were also cited.

Summary Statement of the Matter Involved.

15. The question is whether, when the taxing authorities have imposed, by law, a sales tax designed to rest upon

---

* This narrow view of the effect to be given to this Court's reversal of the *Lazaroff* decision is at variance with the view generally entertained by federal district Judges in the Eastern and Southern Districts of New York. Prior to the amendment of the National Bankruptcy Act, § 64, district Judges had no hesitancy in describing the claim of the City of New York against retail merchants for sums collected from their customers as claims for *taxes* owing by the retailers. See for example *In re Sixty-seven Wall Street Corporation,* 23 F. Supp. 672 (S. D. N. Y., 1938). It is also true that Referees in bankruptcy (including the Referee in the case at bar) likewise shared the view of the district Judges.

consumers, but have required retailers to collect and hand over the taxes, the retailers owe what they have or should have collected, *qua* tax or *qua* debt. Under § 64 of the National Bankruptcy Act as amended (52 Stat. 874), the City is preferred if the sums are owed *qua* tax but not if they are owed *qua* debt. We contend that (1) since the retailers are required to file returns, (2) since they are liable for the amount of the tax whether they have actually collected it from their customers or not, (3) since upon a failure to collect and pay over the sales tax they may be proceeded against by distraint, and (4) since sales taxes cannot be effectively collected in any other way save by having them funnelled through retailers, the decision below was erroneous and prejudicial to the public interest. And it is certainly irreconcilable with *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), discussed in the subjoined brief.

Questions Presented.

16. The questions presented are:

1. When a sales tax law requires retailers to collect sales taxes from customers and forward the collections to the taxing authorities, and requires retailers to file periodic returns, and subjects them to drastic measures upon non-fulfillment of their duties, and makes them liable for the amount of the tax whether they have collected it from their customers or not, are the sums collected or collectible by retailers owed to the taxing authorities *qua* debt or *qua* tax?

2. Was the Circuit Court of Appeals warranted in rejecting the authority of decisions of the New York Courts defining the retailer's obligation in the premises as a tax?

3. If the Circuit Court of Appeals did admit that state decisions were controlling, did it correctly interpret them?

4. Should not the conflict between the Second Circuit and the Tenth Circuit (see *Barbee, Trustee* v. *Oklahoma Tax Commission*, 103 F. [2d] 114 [1939]) be resolved by a declaration that the Tenth Circuit was correct?

5. Should not the phrase "taxes legally due and owing * * * to * * * any State or any subdivision thereof," in National Bankruptcy Act § 64, as amended in 1938, be construed to cover the obligations of the bankrupt at bar to the City of New York?

Assignment of Errors.

17. Your petitioner submits that the Court below erred in holding that what the retailer owed in the premises was owed *qua* debt and not *qua* tax; erred in that it either rejected or misconstrued the applicable decisions of the New York Court of Appeals; erred in misconstruing *New York City* v. *Goldstein*, 299 U. S. 522 (1937); and erred in rejecting the reasoning which led to an opposite result in *Barbee, Trustee* v. *Oklahoma Tax Commission, supra.*

Reasons for Allowance of Writ.

18. Sales taxes as an emergency revenue measure have been imposed by legislation in 20 States.* The amount of a sales tax is, in a majority of the transactions taxed, mea-

* The trend away from *ad valorem* taxes, as sources of state revenue, to other kinds of taxes has been recognized by this Court. *Superior Bath House Co.* v. *McCarroll*, 312 U. S. . . . , 61 Sup. Ct. 503, 505 (Feb. 3, 1941, Cal. No. 180).

sured in pennies. To proceed against the purchaser and to require him to make a return is impracticable, and would cost in administration more than the taxes would bring in in revenue. Sales taxes can only be efficiently collected if they are funnelled through retailers, and obligations of a drastic character imposed upon them. Cf. JACOBY, *Retail Sales Taxation* (1938), p. 100. The local law at bar follows this course. To construe the local law in such a way as to reduce the retailer's obligation from an obligation to pay a *tax* to a mere duty to pay a *debt*, with the consequence that the taxing authorities are deprived of a preference in bankruptcy, is to impose a very serious obstacle in the way of tax collections, and to bring about a very serious diminution of state and municipal revenues. The taxes were imposed to meet an emergency. The local authorities have decided to renew the tax annually on the ground that the emergency has not passed.* The decision below contravenes the public interest so patently as to merit review here.

19. Public importance attaches to the question by reason of the further circumstance that the question is presented in no less than 1,000 bankruptcies in which the City of New York has appeared as a claimant with a claim for sales taxes.

20. The decision below also tends to contravene the nearest applicable decisions in the highest Court of the State and in this Court.

21. The precise question has never been passed upon in this Court since the amendment to the National Bankruptcy Act made in 1938, and in view of the widespread vogue of sales taxes, the writ should issue.

---

* Proof that an emergency still exists in New York is found in the titles of two Acts signed by Governor LEHMAN on March 20, 1941. New York Laws of 1941, ch. 135 and ch. 137.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this case, being No. 171 on its calendar for the October Term, 1940, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, § 347 of the Code of Laws of the United States, and that the said final order of the said Circuit Court of Appeals for the Second Circuit in this case, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit, as well as the determination of the United States District Court for the Southern District of New York, which was affirmed by the said United States Circuit Court of Appeals for the Second Circuit, may be reversed and a mandate issued directing the allowance of the asserted priority; and your petitioner prays for such other and further relief as to this Court shall seem just and equitable; and your petitioner will ever pray.

New York, N. Y., March 21, 1941.

THE CITY OF NEW YORK,
Petitioner,

By WILLIAM C. CHANLER,
Corporation Counsel of the
City of New York,
Municipal Building,
New York, N. Y.

Supreme Court of the United States

No. . October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The case involves an important question under the 1938 amendment to the National Bankruptcy Act. In its claim to priority, on the ground that sales taxes collected or collectible from customers and not paid over to the authorities by the retailer when his bankruptcy intervened were owed *qua* tax and not *qua* debt, the City was successful before the Referee, but unsuccessful before the District Court and the Circuit Court of Appeals. A strong dissenting opinion, however, was written by Judge CHARLES E. CLARK.

POINT I.

The terms of the local laws under which the sales taxes were imposed, and the interpretation of them by the New York Court of Appeals, stamp upon the retailer's obligations the characteristics of a tax as distinguished from a mere debt. Priority in bankruptcy should have been awarded, as it was under substantially similar circumstances in the Tenth Circuit.

1. Features of local law relied on.

Local Law No. 20 of 1934 (erroneously numbered "21" in the compilation published at Albany), as amended by

Local Law No. 24 of 1934 (erroneously numbered "25" in the cited compilation), imposes (in § 2) a tax upon "receipts from every sale in the city of New York" of "tangible personal property sold at retail", with exceptions not here relevant.*

Section 2 goes on to provide:

> "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

Section 5 requires every vendor to "file with the comptroller a return of his receipts and of the taxes payable thereon" for various prescribed periods. The section also contains these words:

> "If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify."

Section 6 contains provisions in reference to security to be furnished by the vendor "to secure the payment of any

---

* Both of these local laws, and the ensuing local laws continuing the taxes for later years, were passed under a special Enabling Act (New York Laws of 1934, ch. 873) to raise revenue for the relief of unemployment.

tax and/or penalties due or which may become due from such vendor". We quote the section in full:

> "§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. *All taxes for the period for which a return is required to be filed shall be due from the vendor* and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to *secure the payment of any tax* and/or penalties due or which may become *due from such vendor.* In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to *recover any tax* and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities." (Italics ours.)

Sections 7 and 10 provide the vendor with the remedy of certiorari where an erroneous determination of the tax is alleged to have been made by the Comptroller, or where a tax has been illegally collected and the Comptroller has failed to make a refund to the vendor. Section 7 gives drastic remedies against a vendor who has failed to file a

return, even allowing the Comptroller to estimate the amount owed "on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors"—surely a harsh way of treating a mere "debtor".

Further remedies against the vendor are given by § 8, which reads in part as follows:

> "§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over *any tax and/or to pay any tax* or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.
>
> As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the *amount of the tax* and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that pro-

vided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner." (Italics ours.)

The vendor's obligation is measured either by the size of his tax collections or by 2% of his receipts from sales, whichever is greater.* His obligation is owed *qua* tax.

Moreover, where the price is below a certain figure, the Comptroller is empowered (§ 3, last sentence) to excuse the vendor from the duty of collecting from the purchaser. The figure was fixed at $0.12 by the Comptroller's Regulations of February 11, 1935, Art. 3. The result of this has been held to be that, on sales below this figure, the vendor is primarily and solely liable. *Queens Vending Corp.* v. *City of New York,* 94 N. Y. L. J. 318 (July 31, 1935), aff'd 246 App. Div. 594 (1st Dept., 1935). A similar result under a somewhat similar statute was reached in *Jensen Candy Co.* v. *State Tax Commission,* 90 Utah 359, 61 Pac. (2d) 629 (1936).

2. The New York Court of Appeals has declared that what the retailer owes is owed *qua* tax. It has expressly disapproved the contrary ruling by the Circuit Court of Appeals in the *Lazaroff* case.

In *Matter of Atlas Television Co.,* 273 N. Y. 51 (1936), the "city of New York filed a claim for 'taxes imposed pursuant to the provisions of Local Law No. 24 of the City of New York for the year 1934' " (p. 53). In describing

* Comptroller's Regulations, issue of December 29, 1938, p. 31.

how the Courts below had viewed our claim, the Court of Appeals said (p. 55):

> "The courts below, too, have assumed that the city has such a preference in the collection of taxes. Preference has been denied in this case because in the opinion of the Appellate Division the city's claim is not for taxes due to the city from the insolvent, but for moneys collected by the insolvent as agent for the city."

The Court used similar language in describing the arguments which the assignee in that case had interposed against ours, saying (pp. 55-56):

> "It is the contention of the assignee that even though the vendor of property is the person entitled to the 'receipts from every sale,' the tax is laid upon the purchaser, and that the vendor is required only to collect the tax as the collecting agent of the city and though required to pay to the city the amount of the tax, his liability is only that of an ordinary debtor."

The Court then gave a synopsis of the holding in *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936), and said (p. 57):

> "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales. (§ 5.) The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own. Indeed the city has insisted that a vendor is liable for a tax of two per cent upon the amount of his receipts even from sales within the amount, stated in regulations promulgated by the Comptroller

> pursuant to section 3 of the local law, upon which 'no tax need be collected from the purchaser.' (*Queens Vending Corp.* v. *City of New York*, 246 App. Div. 594)."

To ignore this paragraph, as the majority below did, was a clear disregard of an applicable decision of the state Court of last resort. The dissenting Judge pointed this out.

The Court then proceeded to hold that taxation was an attribute of sovereignty and that the City acted as sovereign when it imposed taxes for governmental purposes (p. 57). The Court concluded (pp. 57-58):

> "From that point of view it seems clear that the city is entitled to a priority. It has imposed a tax as sovereign and to meet a need which concerns the welfare of the State. It has provided that the vendor of property must pay the tax to it. Though the vendor is required, at least in most cases, to collect the tax from the purchaser 'for and on account of the city,' the purpose of that provision is to place the incidence of the tax immediately on the consumer. The city can collect only from the vendor. The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent. It is an obligation measured by the receipts of the vendor and created by the local law."

We submit that nothing could be more firmly and dogmatically declared than that the City may demand the tax of the vendor *qua* tax.

Judge LEHMAN, in the *Atlas Television* case, having said that "the purpose of that provision * is to place the inci-

---

* The provision requiring the vendor to collect the tax from the purchaser.

dence of the tax immediately on the consumer" (p. 58), the statement of CRANE, Ch.J., in *Matter of Merchants Refrigeration Corp.* v. *Taylor*, 275 N. Y. 113, 124 (1937), to wit:

> "The *Atlas Television* case (273 N. Y. 51) did not hold that the sales tax is imposed on the vendor, but only that he is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser",

must refer to the ultimate incidence of the burden of the tax, and does not diminish the duties and obligations of the vendor *vis-à-vis* the City, which are to pay over 2% of his receipts, *qua* tax and not *qua* debt. And we say the same thing of Judge LOUGHRAN'S opinion in *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938), where he said (p. 297):

> "The sales tax was not imposed on the vendor. It fell upon the purchaser * * * *"*

citing the *Merchants Refrigeration* opinion. He, too, like Chief Judge CRANE before him, meant that when all the duties imposed by the Sales Tax Local Law have been performed, it is the purchaser whose pocketbook has been hit, and that in consequence the vendor had no right to keep sums collected in excess of what the law required. But none the less, what the vendor owes he owes *qua* tax. The dissenting Judge (CLARK, J.) agreed with us that the later decisions do not impair the authority of the *Atlas* case.

All doubts on this score would seem to have been set at rest by the very recent decision in the Court of Appeals in *Matter of David Brown Printing Co., Inc.*, 285 N. Y. _____ (March 6, 1941), wherein upon the insolvency of a retailer, the Court of Appeals unanimously declared that the claim of the City of New York for sales taxes should share equally with a claim by the State of New York for a franchise tax,

thus reiterating in strong terms their view that the obligation of a retailer was an obligation to pay a *tax* and not merely an obligation to discharge a *debt*.

The vendor has the duty of passing the burden on to the purchaser, but again we say that what the vendor pays to the City he pays *qua* tax because (1) "the amount due to the City is not measured by the amount actually collected from the purchaser, but by a percentage of the vendor's total receipts;" * and (2) the reenforcement of the City's right by the requirement that periodic returns be filed by the vendor as well as by the reservation of a right of distraint takes away from the vendor's liability the attributes of a debt and confers upon it the attributes of a tax.† Above all, it is certainly anomalous to classify as a debt and not a tax an obligation into the assumption of which the vendor's volition did not enter at all.

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 43-44 (1940), established nothing hostile to the foregoing. The tax was sustained against an assertion that it burdened interstate commerce, for the simple reason that the seller enjoyed a right, and in fact was under a duty, to pass on the tax to the purchaser. This does not mean that what the seller collected, in fruition of that right or in performance of that duty to shift the incidence, was any the less a tax and owing to the authorities as such. The use the trustee made below of the *Berwind-White* case seems to us to

---

* 18 N. Y. Univ. L. Q. Rev. 136, lines 3-4.

† The capacity of "reenforcements" to change the character of an obligation was adverted to in *McDowell* v. *City of Barberton*, 38 F. (2d) 786 (6th Circ., 1930), where the Court said (p. 788): "But the state gave the color and standing of taxes to municipal water rents to the extent at least that it secured their collection by a possible lien upon the real estate, and we think this peculiarity should be recognized by section 64(a) of the Bankruptcy Act (11 U. S. C. A., § 104(a))."

See also *In re Otto F. Lange Co.*, 159 Fed. 586, 588 (N. D. Iowa, 1908).

involve a transgression of the principle, first uttered in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), that "general expressions, in every opinion, are to be taken in connection with the case in which the expressions are used" (p. 399).

Another reason why the true holding of the *Atlas Television* case must have been what we have stated above is that while the State of New York under state law enjoys priority whether it seeks to enforce a debt or a tax, municipalities under state law enjoy priority only when they are seeking to collect taxes. The sovereignty of the State, and the privileges appurtenant to sovereignty, are shared with municipalities as far as taxes are concerned but not as far as debts are concerned. See *Matter of Northern Bank of New York*, 85 Misc. 594 (1914), aff'd on opinion below 162 App. Div. 974 (1st Dept., 1914), aff'd 212 N. Y. 608 (1914). Here the City, having collected various local taxes, deposited them in a bank which later failed. Clearly the bank owed the money to its depositor *qua* debts and not *qua* taxes. Priority was, under those circumstances, denied.

3. To grant the City the claimed priority would not contravene anything said by this Court in *New Jersey* v. *Anderson*.

We are not unmindful of the statement in *New Jersey* v. *Anderson*, 203 U. S. 483, 491 (1906) that a State "cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact". But that language, in actual practice, seems to have been treated as merely a *caveat* against preposterous and unrealistic definitions; and a recent commentator has said (40 Columbia L. Rev. 1243):

> "Despite this declaration that the federal courts are to make the ultimate decision, the courts have fol-

lowed almost without question the interpretations of the state courts and the language of the state statutes. No bankruptcy case has been found in which a federal court has disagreed with the terminology applied to a particular levy by a state court or disregarded the terms in which the state legislature describes the exaction."

Surely had this Court been disposed to feel any doubt as to the reasonableness of the *Atlas* decision and its capacity to bind federal Courts sitting in New York, it would not have pursued the extraordinary course of reversing the Circuit Court of Appeals *ex parte* without argument, as it did in *New York City* v. *Goldstein, supra.*

4. A conflict among the Circuits is presented.

Upon facts strikingly similar to those at bar, priority was allowed to a state tax commission upon the bankruptcy of a vendor, in *Barbee, Trustee* v. *Oklahoma Tax Commission,* 103 F. (2d) 114 (10th Circ., 1939). The sales tax law of Oklahoma, Okla. L. 1935, ch. 66, p. 311, provided:

> "The tax levied hereunder shall be paid by the consumer and/or user to the vendor, and it shall be the duty of each and every vendor in this State to collect from the consumer or user, the full amount of the tax imposed by this Act, or an amount equal as nearly as possible and/or practicable to the average equivalent thereof.
>
> Vendors shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge, and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts."

The District Court awarded priority (23 F. Supp. 995), and the Circuit Court of Appeals affirmed, citing and fol-

lowing an Oklahoma decision, *In re Harris,* 184 Okla. 459, 88 Pac. (2d) 372 (1939), where the Court had said (p. 462):

> " * * * we conclude that the moneys due from the insolvent debtor are taxes and not merely an ordinary debt owing from him as agent to the state of Oklahoma as principal." *

POINT II.

The City having imposed the sales taxes to meet an emergency, and the Chandler Act, which *inter alia* amended the National Bankruptcy Act to read as it now does, having itself had among its objects the relief of financially embarrassed municipalities, the question of priority should be resolved in favor of the claimant City.

In 1934, Congress tried to come to the relief of municipalities by enabling them to file petitions in bankruptcy. Act of May 24, 1934, 48 Stat. 708. The statute was, to be sure, held unconstitutional in *Ashton* v. *Cameron County Water Improvement District,* 298 U. S. 513 (1936). As amended by the Act of August 16, 1937, 50 Stat. 653, however, the legislation was upheld. *United States* v. *Bekins,* 304 U. S. 27 (April 25, 1938).

It would convict the members of Congress of singular ineptitude if, after having exhibited such persistence in their effort to relieve municipalities, they were deemed (in the Act of June 22, 1938, 52 Stat. 874, passed less than two months after success had crowned their efforts) to have placed municipalities under the handicap of enjoying a less extensive priority in enforcing tax claims in bankruptcy than had previously been theirs. A holding that *New York*

* The Supreme Court of Oklahoma cited and followed *Matter of Atlas Television Co., supra,* and *Matter of Rockaway Paint Centre,* 249 App. Div. 66 (2nd Dept., 1936).

City v. *Goldstein*, 299 U. S. 522 (1937), has ceased to be authoritative since the passage of the Act of June 22, 1938, is therefore, a result to be avoided.

The debates, moreover, also implement what we have just stated. Congress in the debates on the bill which later became the Act of August 16, 1937, showed (81 Cong. Rec., part 6, p. 6313) an awareness of the impotence of the taxing power of the average municipality to afford adequate relief in times of emergency. In later amending this Act by the Act of June 22, 1938 (52 Stat. 840, at p. 940), which is the very Act by which the priority section was amended (see *supra*, p. 2), they cannot have intended to effect a deliberate impairment of the already inadequate taxing power by making tax collections in bankruptcy more difficult.

We may further reenforce our argument by pointing to the circumstance that before the adoption of the 1938 amendment, legislation had been adopted not only in New York City but in approximately 20 States, providing for retail sales taxes and imposing upon vendors the duty to collect the taxes from customers and transmit them to the authorities. While judicial decisions that what a vendor owed under these circumstances he owed *qua* tax, had, prior to 1938, been handed down in only two States, *Doby* v. *State Tax Commission*, 234 Ala. 150, 153, 174 So. 233 (1937), and *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), which was followed in *New York City* v. *Goldstein*, 299 U. S. 522 (1937), yet it is not too much to say that the respective legislatures probably assumed that such would be the ultimate holding of the Courts—an assumption which has been borne out by several subsequent decisions, *e. g.*, *DeAryan* v. *Akers*, 12 Cal. (2d) 781, 87 Pac. (2d) 695 (1939), certiorari denied 308 U. S. 581 (1939); *State ex rel. Foster* v. *Miller*, 136 Ohio St. 295, 303, 25 N. E. (2d) 686 (1940); *In re Harris*, 184 Okla. 459, 462, 88 Pac. (2d) 372 (1939); *State Tax Commission* v. *Spanish Fork*, 99 Utah , 100 Pac. (2d) 575 (1940).

In *Doby* v. *State Tax Commission, supra,* the Court said (p. 153):

> "The retailer is the 'taxpayer', the person liable to the state for the tax. He is the person required to take out the license under [Ala. Acts, 1936-37, p. 125] section 3, the person required to make returns and pay the tax to the State Tax Commission under sections 5 and 6; the person required to keep records under section 8; the person on whose personal property a lien is declared as security for the tax under section 9."

In *DeAryan* v. *Akers, supra,* the Court held that the seller was the person on whom a tax obligation was imposed in spite of the fact that the statute contained a proviso to the effect that the "tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done" (p. 784).

Conclusion.

The Petition for Certiorari should be granted.

New York, N. Y., March 21, 1941.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

APPENDIX.

Local Law No. 24 of 1934, §§ 3-8 (erroneously numbered "25" at page 164 of the compilation published at Albany).

"§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal two per centum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive. If he deems it necessary in order to

insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall deter-

mine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied."

Lawyers Press, Inc., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

BLANK PAGE

BLANK PAGE

FILE COPY

(8496)

Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

April 23, 1941.

WILLIAM C. CHANLER,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

BLANK PAGE

OUTLINE OF ARGUMENT.

Table of Cases Cited.

Other Authorities.

Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on April 14, 1941, to review a final order (R., 40) of the United States Circuit Court of Appeals for the Second Circuit, affirming (CLARK, Cir. J., dissenting) a final order in bankruptcy (R., 27-28) made by the United States District Court for the Southern District of New York (CLANCY, J.), which (so far as relevant) allowed the claim of the petitioner against National Studios, Inc., the bankrupt—the respondent here being the Trustee—, *as a general claim.* We have contended throughout that the petitioner should have been awarded priority under § 64 of the National Bankruptcy Act, as amended (52 Stat. 874); and the ultimate proposition of law to establish which we obtained a writ of certiorari is that where a retailer who is compelled by local law to collect a sales tax from his customers and hand it over to the authorities goes into bankruptcy without performing these duties, the amounts which the retailer has or should have collected from his customers is owed to the authorities *qua* tax and not *qua* debt, and hence is entitled to priority under the cited section of the National Bankruptcy Act.

The sum originally demanded as sales taxes which the bankrupt should have collected from its customers was reduced by compromise, and by stipulation at the hearing (R., 12), to $796. Of this sum the bankrupt had collected $60 only from its customers, and even this sum had not been segregated and could not be traced into the possession of the trustee (R., 12).

Opinions Below.

Four opinions are found in the Record, *viz.*, that of the Referee, that of the District Court, that of the majority of the Circuit Court of Appeals, and that of the dissenting Judge.

(i)

The Referee stated that the case presented to him in the City's proof of claim and the Trustee's objections thereto required him "to determine whether the claim of the City of New York is a claim for a tax legally due and owing by the bankrupt or whether it is a claim against the bankrupt only as a collector of such taxes" (R., 14). He then adverted to the requirement in the local law (Local Law No. 24 of 1934, set forth in Appendix A, *post*, p. 31) that every vendor is to "file with the comptroller a return of his receipts and of the taxes payable thereon" (§ 5, R., 14, 15); thereafter quoted the first paragraph of § 8, set forth *post*, p. 8; and finally cited the right to order the sheriff to make a distraint, also set forth *post*, p. 9. He concluded (R., 15):

> "These provisions of the law impose two liabilities upon the vendor: one is to collect the tax from the vendee and pay it to the City; the other liability is to pay the City the amount of the tax whether the vendor collects it or not. This latter obligation is a tax legally due and owing by the bankrupt. Such was the reasoning of the Court in *Matter of Atlas Tele-*

vision Co., Inc., 273 N. Y. 51, and since the claim of the City of New York expressly claims that the bankrupt is justly and truly indebted to it for taxes the claim is entitled to priority."

(ii)

The District Judge cited (R., 23-24) three decisions of the New York Court of Appeals on the nature of the seller's obligations under the sales tax local laws: *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936); *Matter of Merchants Refrigeration Co.* v. *Taylor*, 275 N. Y. 113, 124 (1937); and *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 (1938). From these he concluded that the sales tax local law imposes a duty on the vendor to forward collections to the City but does not impose the burden of the tax *qua* tax upon him. He also cited *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), as holding the tax was on the purchaser since it was held not to burden a seller engaged in interstate commerce.* He concluded that when the decision of this Court in *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936), was reversed *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937), upon the authority of *Matter of Atlas Television Co., supra*, this Court upheld the City's asserted priority because the bankrupt owed a debt to the City under the National Bankruptcy Act, U. S. Code, tit. 11, § 104(7) and did not owe a tax under § 104(6); so that the amendment of 1938 (52 Stat. 874) stripping debts owing to cities of any right to priority compels the City to show that vendors owe sales taxes (collected or collectible from their customers) *qua* taxes and not *qua* debts. This, he said, the City cannot do. He accordingly reversed the Referee.

---

* As we show *post*, p. 18, we are not in any sense going back on the position we took at the bar of this Court in the *Berwind-White* case.

(iii)

Judge CHASE, with whom Judge SWAN concurred, held that when *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), was decided, the City had priority under state law regardless of whether its claim against a retailer was a claim for a tax or a claim for a debt (R., 37). The Circuit Court of Appeals had, prior to that decision, held that such a claim was one for a debt. *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936). This Court reversed that decision on the authority of the *Atlas* case, *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937). But this Court, said Judge CHASE, did not disapprove of so much of the *Lazaroff* opinion as held the claim to be a debt and not a tax, since the City, under the National Bankruptcy Act as it then stood, was entitled to prevail whichever way the claim was categorized. This was error, as we show *post*, p. 20. The Court concluded by renewing and reiterating the declarations it had made in *Matter of Lazaroff*, *supra*, as well as in *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859 (2nd Circ., 1925), that sums owed by retailers, for taxes collected or collectible from their customers, are owed *qua* debt and not *qua* tax.*

---

* This narrow view of the effect to be given to this Court's reversal of the *Lazaroff* decision is at variance with the view generally entertained by federal district Judges in the Eastern and Southern Districts of New York. Prior to the amendment of the National Bankruptcy Act, § 64, district Judges had no hesitancy in describing the claim of the City of New York against retail merchants for sums collected from their customers as claims for *taxes* owing by the retailers. See for example *In re Sixty-seven Wall Street Corporation*, 23 F. Supp. 672 (S. D. N. Y., 1938). It is also true that Referees in Bankruptcy (including the Referee in the case at bar) likewise shared the view of the district Judges.

(iv)

Judge CLARK dissented, and pointed out (R., 39) that in the *Atlas* opinion the New York Court of Appeals had expressly criticized the *Lazaroff* opinion as reflecting an erroneous interpretation of New York law, and as denominating a *debt* what was really, in the judgment of the New York Court of Appeals, a *tax*.

Judge CLARK also referred (*ibid.*) to a holding in the Tenth Circuit that what the retailer owes in circumstances like those at bar is owed *qua* tax and not *qua* debt. *Barbee, Trustee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114 (10th Circ., 1939). Two law review notes to the same effect (18 N. Y. Univ. Law Q. Rev. 135; 40 Columbia L. Rev. 1241) were also cited.

Jurisdiction.

The order of the United States Circuit Court of Appeals for the Second Circuit was filed March 19, 1941. The jurisdiction of this Court is based on U. S. Code, tit. 28, § 347, subd. (a). The petition was filed in this Court March 22, 1941, and was granted April 14, 1941.

The City of New York (petitioner here) as claimant in bankruptcy made an assertion of priority in its proof of claim (R., 3), and the Trustee filed an objection (R., 4) to the asserted priority.

The issues of law thus framed were decided in favor of the contention of the petitioner by the Referee, but against that contention by the Courts, and the claim was allowed as a general claim only. See the opinions hereinbefore abstracted. The order of the Referee is at R., 16; the order of the District Court is at R., 27; the order of the Circuit Court of Appeals is at R., 40.

Statutes Involved.

1. The Enabling Act.

In 1934, the need of raising revenue to defray the costs of unemployment relief led to the passage by the Legislature of the State of New York of an Enabling Act (L. 1934, ch. 873) which authorized the City of New York to impose any tax or taxes

> "which the legislature has or would have power and authority to impose to relieve the people * * * from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer"

of the City.

We have not reprinted the Enabling Act since the case does not call for an interpretation of its language. We pass at once to the local laws adopted pursuant to it.

2. The Local Laws.

The City Sales Tax Local Law is reprinted in Appendix A, *post*, p. 31. It has been renewed annually, without any significant variations of phraseology (R., 36).

Local Law No. 20 of 1934 (erroneously numbered "21" in the compilation published at Albany), as amended by Local Law No. 24 of 1934 (erroneously numbered "25" in the cited compilation), imposes (in § 2) a tax upon "receipts from every sale in the city of New York" of "tangible personal property sold at retail", with exceptions not here relevant.

Section 2 goes on to provide:

> "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the

sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

Section 5 requires every vendor to "file with the comptroller a return of his receipts and of the taxes payable thereon" for various prescribed periods. The section also contains these words:

> "If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify."

Section 6 contains provisions in reference to security to be furnished by the vendor "to secure the payment of any tax and/or penalties due or which may become due from such vendor". We quote the section in full:

> "§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. *All taxes for the period for which a return is required to be filed shall be due from the vendor* and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety com-

pany authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to *secure the payment of any tax* and/or penalties due or which may become *due from such vendor*. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to *recover any tax* and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities." (Italics ours.)

Sections 7 and 10 provide the vendor with the remedy of certiorari where an erroneous determination of the tax is alleged to have been made by the Comptroller, or where a tax has been illegally collected and the Comptroller has failed to make a refund to the vendor. Section 7 gives drastic remedies against a vendor who has failed to file a return, even allowing the Comptroller to estimate the amount owed "on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors"—surely a harsh way of treating a mere "debtor".

Further remedies against the vendor are given by § 8, which reads in part as follows:

"§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over *any tax and/or to pay any tax* or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the *amount of the tax* and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner." (Italics ours.)

The vendor's obligation is measured either by the size of his tax collections or by 2% of his receipts from sales, whichever is greater.* His obligation is owed *qua* tax.

Moreover, where the price is below a certain figure, the Comptroller is empowered (§ 3, last sentence) to excuse the vendor from the duty of collecting from the purchaser. The figure was fixed at $0.12 by the Comptroller's Regulations

* Comptroller's Regulations, issue of December 29, 1938, p. 31.

of February 11, 1935, Art. 3. The result of this has been held to be that, on sales below this figure, the vendor's liability becomes primary, and the duty to shift the burden to the purchaser and collect from him ceases. *Queens Vending Corp.* v. *City of New York*, 94 N. Y. L. J. 318 (July 31, 1935), aff'd 246 App. Div. 594 (1st Dept., 1935). A similar result under a somewhat similar statute was reached in *Jensen Candy Co.* v. *State Tax Commission*, 90 Utah 359, 61 Pac. (2d) 629 (1936).

3. The National Bankruptcy Act.

The National Bankruptcy Act, § 64, as amended by 52 Stat. 840, 874, awards priority in bankruptcy to "*taxes legally due and owing by the bankrupt* * to the United States or any State or any subdivision thereof * * *." A provision formerly forming part of this section and awarding priority (after taxes) to "debts owing to any person who by the laws of the States or the United States is entitled to priority" was modified by striking out the words "the States or," so that it possesses no present pertinence.

Specification of Errors to be Urged.

1. We contend that it was error for the Circuit Court of Appeals to refuse to hold that when a sales tax law requires retailers to collect sales taxes from customers and forward the collections to the taxing authorities, and requires retailers to file periodic returns, and subjects them to drastic measures upon non-fulfillment of their duties, and makes them liable for the amount of the tax whether they have collected it from their customers or not, the sums collected or collectible by retailers are owed to the taxing authorities *qua* tax and not *qua* debt.

---

* The italicized words have been in the National Bankruptcy Act since its original enactment in 1898 (30 Stat. 563).

2. We further contend that the Circuit Court of Appeals erred in that it either rejected the authority of, or adopted an erroneous interpretation of, decisions of the New York Courts defining as a tax the obligation of the retailer in the premises set forth in the record.

3. We further contend that it was error for the Circuit Court of Appeals to refuse to hold that "taxes legally due and owing * * * to * * * any State or any subdivision thereof," in National Bankruptcy Act § 64, as amended in 1938, should be construed to cover the obligations of the bankrupt at bar to the City of New York.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. The terms of the local laws under which the sales taxes were imposed, and the interpretation of them by the New York Court of Appeals, stamp upon the retailer's obligations the characteristics of a tax as distinguished from a mere debt. Priority in bankruptcy should accordingly have been awarded.

2. Since practical obstacles make it impossible for the taxing authorities to collect sales taxes from purchasers directly, and since such taxes must of necessity be funneled through the retail merchants, public policy favors holding the retailer's obligations, upon his bankruptcy, to be owed *qua* tax and not *qua* debt. The Chandler Act, amending § 64 of the National Bankruptcy Act, should be so construed as to give effect to this policy.

POINT I.

The terms of the local laws under which the sales taxes were imposed, and the interpretation of them by the New York Court of Appeals, stamp upon the retailer's obligations the characteristics of a tax as distinguished from a mere debt. Priority in bankruptcy should accordingly have been awarded.

1. The various provisions of the local law defining the retailer's duties regarding sales tax collections transmute his obligations from a debt into a tax.

We have analyzed the New York City Sales Tax Local Law *ante*, pages 6-10. A brief rehearsal of its salient provisions will show its capacity to transmute the obligations which the retailer owes to the City, and to take them out of the lowly category of "debt" and exalt them to the higher category of "tax".

The capacity of "reenforcements" to affect the legal attributes of an obligation was adverted to in *McDowell* v. *City of Barberton*, 38 F. (2d) 786 (6th Circ., 1930), where the Court said (p. 788):

> "But the state gave the color and standing of taxes to municipal water rents to the extent at least that it secured their collection by a possible lien upon the real estate, and we think this peculiarity should be recognized by section 64(a) of the Bankruptcy Act (11 U. S. C. A., § 104(a))."

See also *In re Otto F. Lange Co.*, 159 Fed. 586, 588 (N. D. Iowa, 1908).

Thus in § 2 it is provided that the vendor, though empowered if necessary to sue the purchaser for the tax (thus

accomplishing his own exoneration), "shall be liable for the collection" of the tax.

The vendor is required by § 5 to file periodic returns "of his receipts [from the sale of goods] and of the taxes payable thereon * * *". The Comptroller, "to insure the payment of the tax imposed by this local law" may require returns to be made for other than the normal, specified periods and upon other dates, as he may specify. Clearly "payable" and "payment" in these quotations mean, from their context, "payable by the vendor" and "payment by the vendor", and the vendor by being required to file returns, is treated as the taxpayer—with, however, a right and a duty to exonerate himself by passing the tax on to the consumer.

Section 6 goes further in removing doubt as to the nature of the vendor's obligation. It provides that at the time of filing returns, "each *vendor shall pay* to the comptroller *the taxes* imposed by this local law upon the receipts required to be included in such return." This would seem to be almost conclusive by itself. There is, moreover, additional significance in the phrases "*taxes* for the period for which a return is required to be filed *shall be due from the vendor*", and "secure [by bond] the payment of any *tax* * * * which may become due *from the vendor.*"

Sections 7 and 8 give the Comptroller harsh and drastic remedies against a vendor. These remedies are familiar remedies against taxpayers; they are not familiar remedies against mere debtors. We refer particularly to the Comptroller's right, given by § 7, to estimate the amount owed "on the basis of external indices, such as number of employees of the person concerned [*i. e.*, the vendor], rentals paid by him, his stock on hand, and/or other factors * * *"; and the right of the Comptroller, reserved in § 8, to issue, without application to any Court, a warrant directing the

sheriff "to levy upon and sell the real and personal property of the vendor * * * for the payment of the amount thereof" (*i. e.*, of the tax).

In § 12, the Comptroller is given the power to subpoena the vendor's books and records.

Correlatively, §§ 7 and 10 confer on the vendor the right to review, upon certiorari, the determination of tax liability made by the Comptroller upon the basis of the returns filed by the vendor. The Comptroller has to give notice of his determination "to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser * against whom it is assessed" applies for a certiorari order within 30 days.

2. The New York Court of Appeals has declared that what the retailer owes is owed *qua* tax. It has expressly disapproved the contrary ruling by the Circuit Court of Appeals in the *Lazaroff* case.

In *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), a proceeding conducted under the state insolvency laws, the "city of New York filed a claim for 'taxes imposed pursuant to the provisions of Local Law No. 24 of the City of New York for the year 1934'" (p. 53). In describing

* In exceptional cases the Comptroller will, under § 2, assess the tax in the first instance directly against the purchaser. This normally happens when the purchaser has resisted the vendor's efforts to collect the tax, and the latter, to escape penalties, has brought the matter to the Comptroller's attention. It happens also when a particular purchaser, who buys large quantities of an article, desires to bring a test case himself. For an illustration of this, see *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430 (1940). To cover cases of direct assessments against purchasers, the right to review by certiorari has been conferred on them in §§ 7 and 10.

how the Courts below had viewed our claim, the Court of Appeals said (p. 55):

> "The courts below, too, have assumed that the city has such a preference in the collection of taxes. Preference has been denied in this case because in the opinion of the Appellate Division the city's claim is not for taxes due to the city from the insolvent, but for moneys collected by the insolvent as agent for the city."

The Court used similar language in describing the arguments which the assignee in that case had interposed against ours, saying (pp. 55-56):

> "It is the contention of the assignee that even though the vendor of property is the person entitled to the 'receipts from every sale,' the tax is laid upon the purchaser, and that the vendor is required only to collect the tax as the collecting agent of the city and though required to pay to the city the amount of the tax, his liability is only that of an ordinary debtor."

The Court then gave a synopsis of the holding in *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936), and said (p. 57):

> "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales. (§ 5.) The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own. Indeed the city has insisted that a vendor is liable for a tax of two per cent upon the amount of his receipts even from sales within the amount, stated in regulations promulgated by the Comptroller

> pursuant to section 3 of the local law, upon which 'no tax need be collected from the purchaser.' (*Queens Vending Corp.* v. *City of New York,* 246 App. Div. 594)."

To ignore this paragraph, as the majority below did, was a clear disregard of an applicable decision of the state Court of last resort. The dissenting Judge pointed this out (R., 39).*

The Court then proceeded to hold that taxation was an attribute of sovereignty and that the City acted as sovereign when it imposed taxes for governmental purposes (p. 57). The Court concluded (273 N. Y., at pp. 57-58):

> "From that point of view it seems clear that the city is entitled to a priority. It has imposed a tax as sovereign and to meet a need which concerns the welfare of the State. It has provided that the vendor of property must pay the tax to it. Though the vendor is required, at least in most cases, to collect the tax from the purchaser 'for and on account of the city,' the purpose of that provision is to place the incidence of the tax immediately on the consumer. The city can collect only from the vendor. The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent. It is an obligation measured by the receipts of the vendor and created by the local law."

We submit that nothing could be more firmly and dogmatically declared than that the City may demand the tax of the vendor *qua* tax.

---

* Note the language of the commentator on the District Court's decision in the instant case in 18 N. Y. Univ. L. Q. Rev. 136: "The court's interpretation of the *Atlas* decision in the instant case as holding that the City received priority because the obligation was a debt entitled to priority under State law and not a tax, is contradicted by the explicit words of the opinion," citing the passage just quoted.

Judge LEHMAN, in the *Atlas Television* case, having said that "the purpose of that provision * is to place the incidence of the tax immediately on the consumer" (p. 58), the statement of CRANE, Ch.J., in *Matter of Merchants Refrigeration Corp.* v. *Taylor*, 275 N. Y. 113, 124 (1937), to wit:

> "The *Atlas Television* case (273 N. Y. 51) did not hold that the sales tax is imposed on the vendor, but only that he is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser",

must refer to the ultimate incidence of the burden of the tax, and does not diminish the duties and obligations of the vendor *vis-à-vis* the City, which are to pay over 2% of his receipts, *qua* tax and not *qua* debt. And we say the same thing of Judge LOUGHRAN'S opinion in *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938), where he said (p. 297):

> "The sales tax was not imposed on the vendor. It fell upon the purchaser * * *"

citing the *Merchants Refrigeration* opinion. He, too, like Chief Judge CRANE before him, meant that when all the duties imposed by the Sales Tax Local Law have been performed, it is the purchaser whose pocketbook has been hit, and that in consequence the vendor, in the *Kesbec* case, had no right to keep sums collected in excess of what the law required. The same thought is found in *Matter of United Autographic Register Co.* v. *McGoldrick*, 260 App. Div. 157, 161 (1st Dept., 1940), aff'd 285 N. Y., mem. p. 19 (1941). But none the less, what the vendor owes he owes *qua* tax. The dissenting Judge (CLARK, J.) agreed with us that the later decisions do not impair the authority of the *Atlas* case (R., 39).

---

* The provision requiring the vendor to collect the tax from the purchaser.

All doubts on this score would seem to have been set at rest by the very recent decision of the Court of Appeals in *Matter of Brown Printing Co., Inc.*, 285 N. Y. 47 (1941), wherein upon the insolvency of a retailer, the Court of Appeals unanimously declared that the claim of the City of New York for sales taxes should share equally with a claim by the State of New York for a franchise tax, thus reiterating in strong terms their view that the obligation of a retailer was an obligation to pay a *tax* and not merely an obligation to discharge a *debt*.

The vendor has the duty of passing the burden on to the purchaser, but again we say that what the vendor pays to the City he pays *qua* tax because (1) "the amount due to the City is not measured by the amount actually collected from the purchaser, but by a percentage of the vendor's total receipts;" * and (2) the reenforcement of the City's right by the requirement that periodic returns be filed by the vendor as well as by the reservation of a right of distraint takes away from the vendor's liability the attributes of a debt and confers upon it the attributes of a tax.† Above all, ~~it is~~ certainly anomalous to classify as a debt and not a tax an obligation into the assumption of which the vendor's volition did not enter at all. *City of Rochester* v. *Bloss*, 185 N. Y. 42, 47-48 (1906). See also *New Jersey* v. *Anderson*, 203 U. S. 483, 492-493 (1906).

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 43-44 (1940), established nothing hostile to the foregoing. The tax was sustained against an assertion that it burdened interstate commerce, for the simple reason that the seller enjoyed a right, and in fact was under a duty, to pass on the tax to the purchaser. This does not mean that what the seller collected, in fruition of that right or in perform-

---

* 18 N. Y. Univ. L. Q. Rev. 136, lines 3-4.
† See authorities cited *ante*, p. 12.

ance of that duty to shift the incidence, was any the less a tax and owing to the authorities as such. The use the Courts below (R., 26, 38) made of the *Berwind-White* case seems to us to involve a transgression of the principle, first uttered in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), that "general expressions, in every opinion, are to be taken in connection with the case in which the expressions are used" (p. 399).

Common elements exist between the *Berwind-White* case and another recent case, *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940). Here the State laid a percentage tax on charges for the use of safe deposit boxes. The banks were required (1) to collect the taxes from their customers, (2) to forward the collections to the State, and (3) to include them in the bills submitted to customers. The tax was held not offensive against the laws dealing with state taxes on national banks, since the banks were required to pass the burden on to their customers. In determining the incidence of the burden, this Court pursued the same course of reasoning as in the *Berwind-White* case, and said (pp. 52-53):

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by § 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax."

On the other hand, when questions of priority arise, there is no reason why the retailer may not be deemed the person by whom taxes are "legally due and owing", even though we at the same time are required by the *Colorado Bank* case to call the purchaser the taxpayer. For in applying the priority statute (National Bankruptcy Act, § 64), the important thing is to ascertain to whom the taxing authorities principally look for the sums payable under the tax statutes, since only by awarding priority upon the bankruptcy *of such persons* can the policy behind § 64 be effectuated.

Another reason why the true holding of the *Atlas Television* case must have been what we have stated above is that while the *State* of New York under state law enjoys priority whether it seeks to enforce a debt or a tax, *municipalities* under state law enjoy priority only when they are seeking to collect taxes. The sovereignty of the State, and the privileges appurtenant to sovereignty, are shared with municipalities as far as taxes are concerned but not as far as debts are concerned. See *Matter of Northern Bank of New York*, 85 Misc. 594 (1914), aff'd on opinion below 162 App. Div. 974 (1st Dept., 1914), aff'd 212 N. Y. 608 (1914). Here the City, having collected various local taxes, deposited them in a bank which later failed. Clearly the bank owed the money to its depositor *qua* debts and not *qua* taxes. Priority was, under those circumstances, denied.

3. *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859, is unsound in principle and should be disapproved.

We had assumed that after the decision of the Circuit Court of Appeals in the *Lazaroff* case (84 F. [2d] 982) had been reversed in this Court (299 U. S. 522), the case of *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859 (2nd Circ.,

1925), on which the Circuit Court of Appeals had rested its opinion, would be allowed to sink into what Mr. Justice HOLMES, in another connection, called "a deserved repose".* But Judge CHASE has cited it as a subsisting authority (R., 36), and we shall endeavor to give it, with all due deference, a *coup de grace.*

In the *Nolte* case, the United States filed a claim with the receiver in equity of the Company and claimed priority for the claim on the ground that it was for transportation taxes imposed by 40 Stat. 314 and 40 Stat. 1101. The general priority statute (U. S. R. S. § 3466) was regarded as inadequate to meet the situation because it covered only "debts" and not "taxes", and because an insolvent who had submitted to a consent receivership was not regarded as embraced within the phrase "insolvent [who] has made a voluntary assignment" or has committed an act of bankruptcy. Consequently, the government had to rely on U. S. R. S. § 3186 which gave it a lien for "taxes". There the government struck a snag, for as to carriers, it was merely their duty to collect the tax from travelers or shippers and pay it to the government. Hence the Court said (p. 862):

> "A tax is a pecuniary burden imposed for the support of government. The courts have said again and again that a tax is not a debt nor in the nature of a debt. It is not, as is a debt, founded on contract or agreement. It is an impost levied by authority of the government upon its citizens or subjects for the support of the state. The taxpayer is the one upon whom the pecuniary burden is imposed and whose duty it is to make payment. The burden of making payment here rests on the traveler or shipper. The duty of collecting it and then paying over the amount collected rests on the carrier it is true, but this does not make the carrier a taxpayer as distinguished from a tax collector."

---

* Dissenting, in *Adkins* v. *Children's Hospital,* 261 U. S. 525, 570 (1923).

Passing over the obvious differentiating circumstance that in the *Nolte* case the Court was passing upon the rights of the United States as a creditor * and not those of a State, we venture, with deference, to offer the following criticisms of Judge ROGERS' reasoning.

(1) It draws a distinction between taxes and debts on the ground that the former are impositions *in invitum* while the latter have their origin in contract or agreement. But the duty of the carrier to transmit its collections to the government is imposed on it with as little concern for its consent as were the taxes imposed on the carrier directly. Cf. *City of Rochester* v. *Bloss, ante,* p. 18.

(2) The distinction between taxes and debts, though featured in *Meriwether* v. *Garrett,* 102 U. S. 472 (1881), a case which was not cited by the Court, is without merit as far as the policy behind § 3466 is concerned, and a few months later a decision to this effect was handed down by this Court. See *Price* v. *United States,* 269 U. S. 491, 501-502 (1926).

(3) The doctrine laid down by the Court that U. S. R. S. § 3466 was not brought into operation when a corporation filed a consent answer in an equity receivership—a doctrine which made it necessary to draw a distinction between taxes and debts—was disapproved in *Price* v. *United States, supra.*

---

* An examination of the War Revenue Act of 1917 (40 Stat. 314) and of the Revenue Act of 1918 (40 Stat. 1101), under which the carriers were required to collect from passengers a tax on tickets, shows that the United States reserved to itself against carriers who failed to comply with the law radically different remedies from those the City reserved against vendors in the local laws cited *ante,* pp. 12-14. The carriers were liable to penalties, not exceeding $1000, or to imprisonment, and, in addition, to a penalty equal to twice the tax which they had omitted to collect. They were not given directly the right to review the amount of the tax by certiorari or any equivalent remedy.

Nolte v. *Hudson Navigation Co., supra,* has thus become an outmoded decision, and only a slight stretch of the principle *cessante ratione cessat quoque lex* need be made to justify this Court in declaring that it has ceased to possess any authority.

4. Ample precedents exist for holding that what the bankrupt owed to the petitioner was owed *qua* tax and not *qua* debt.

Upon facts strikingly similar to those at bar, priority was allowed to a state tax commission upon the bankruptcy of a vendor, in *Barbee, Trustee v. Oklahoma Tax Commission,* 103 F. (2d) 114 (10th Circ., 1939). The sales tax law of Oklahoma, Okla. L. 1935, ch. 66, p. 311, provided:

> "The tax levied hereunder shall be paid by the consumer and/or user to the vendor, and it shall be the duty of each and every vendor in this State to collect from the consumer or user, the full amount of the tax imposed by this Act, or an amount equal as nearly as possible and/or practicable to the average equivalent thereof.
>
> Vendors shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge, and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts."

The District Court awarded priority (23 F. Supp. 995), and the Circuit Court of Appeals affirmed, citing and following an Oklahoma decision, *In re Harris,* 184 Okla. 459, 88 Pac. (2d) 372 (1939), where the Court had said (p. 462):

> " * * * we conclude that the moneys due from the insolvent debtor are taxes and not merely an ordinary

debt owing from him as agent to the state of Oklahoma as principal." *

A number of state Courts of last resort, perceiving the necessity of making sales tax collections effective, have reached results substantially similar to the result in the *Barbee* case, under tax laws like the one at bar. See *e. g.*, *DeAryan v. Akers*, 12 Cal. (2d) 781, 87 Pac. (2d) 695 (1939), certiorari denied 308 U. S. 581 (1939); *State ex rel. Foster* v. *Miller*, 136 Ohio St. 295, 303, 25 N. E. (2d) 686 (1940); *In re Harris*, 184 Okla. 459, 462, 88 Pac. (2d) 372 (1939); *State Tax Commission* v. *Spanish Fork*, 99 Utah , 100 Pac. (2d) 575 (1940).

In *Doby* v. *State Tax Commission, supra*, the Court said (p. 153):

> "The retailer is the 'taxpayer', the person liable to the state for the tax. He is the person required to take out the license under [Ala. Acts 1936-37, p. 125] section 3, the person required to make returns and pay the tax to the State Tax Commission under sections 5 and 6; the person required to keep records under section 8; the person on whose personal property a lien is declared as security for the tax under section 9."

In *DeAryan* v. *Akers, supra*, the Court held that the seller was the person on whom a tax obligation was imposed in spite of the fact that the statute contained a proviso to the effect that the "tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done" (p. 784).

It may be said, in summary, that the process in the course of which the City's claim against the bankrupt

---

* The Supreme Court of Oklahoma cited and followed *Matter of Atlas Television Co., supra*, and *Matter of Rockaway Paint Centre*, 249 App. Div. (N. Y.) 66 (2nd Dept., 1936).

retailer arose, is and remains a process of tax collection, until the purchasers' pennies are safely in the public treasury. The collections should preserve until that moment the character they had when the purchaser first placed them on the counter. Any other view would render ineffective the aid to the public authorities which was the original objective back of § 64, and which remained so after the 1938 amendment (see *post*, pp. 27-28).

5. To grant the City the claimed priority would not contravene anything said by this Court in *New Jersey* v. *Anderson*.

We are not unmindful of the statement in *New Jersey* v. *Anderson*, 203 U. S. 483, 491 (1906) that a State "cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact". But that language, in actual practice, seems to have been treated as merely a *caveat* against preposterous and unrealistic definitions; and a recent commentator has said (40 Columbia L. Rev. 1243):

> "Despite this declaration that the federal courts are to make the ultimate decision, the courts have followed almost without question the interpretations of the state courts and the language of the state statutes. No bankruptcy case has been found in which a federal court has disagreed with the terminology applied to a particular levy by a state court or disregarded the terms in which the state legislature describes the exaction."

Surely had this Court been disposed to feel any doubt as to the reasonableness of the *Atlas* decision and its capacity to bind federal Courts sitting in New York, it would not have pursued the extraordinary course of reversing the Circuit

Court of Appeals without hearing argument, as it did in *New York City* v. *Goldstein, supra.*

It is hardly necessary to add that since the decision in *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), the caveat quoted from *New Jersey* v. *Anderson, supra,* is one whose authority is on the wane.

POINT II.

Since practical obstacles make it impossible for the taxing authorities to collect sales taxes from purchasers directly, and since such taxes must of necessity be funneled through the retail merchants, public policy favors holding the retailer's obligations, upon his bankruptcy, to be owed *qua* tax and not *qua* debt. The Chandler Act, amending § 64 of the National Bankruptcy Act, should be so construed as to give effect to this policy.

(1)

Sales taxes as an emergency revenue measure have been imposed by legislation in 20 States. The trend away from *ad valorem* taxes, as sources of state revenue, to other kinds of taxes has been recognized by this Court. *Superior Bath House Co.* v. *McCarroll,* 312 U. S. ____, 61 Sup. Ct. 503, 505 (Feb. 3, 1941, Cal. No. 180). The amount of a sales tax is, in a majority of the transactions taxed, measured in pennies. To proceed against the purchaser and to require him to make a return is impracticable, and would cost in administration more than the taxes would bring in in revenue. Sales taxes can only be efficiently collected if they are funneled through retailers, and obligations of a drastic character imposed upon them. Cf. JACOBY, *Retail Sales Taxation* (1938), p. 100. The local law at bar follows this

course. To construe the local law in such a way as to reduce the retailer's obligation from an obligation to pay a *tax* to a mere duty to pay a *debt*, with the consequence that the taxing authorities are deprived of a preference in bankruptcy, is to impose a very serious obstacle in the way of tax collections, and to bring about a very serious diminution of state and municipal revenues. The taxes were imposed to meet an emergency. The local authorities have decided to renew the tax annually on the ground that the emergency has not passed.* The decision below contravenes the public interest so patently that it should not be allowed to stand.

(2)

The decision below leads to a curious result. The sales tax, as we have shown, is a consumers' tax, the vendor being (with minor exceptions not here material) forbidden to absorb it. These provisions were inserted by the local legislative body in order to make the public conscious of what unemployment relief was costing the community. If the City had made the tax a vendors' tax—a shift in design which would not have affected the revenue raised but only the extent of the public awareness that the tax had been imposed—the City's priority would have been indisputable. To make a loss of priority the consequence of the City's desire to make the public tax-conscious would be to bring about, in large measure, the defeat of the policy behind § 64—especially as no less than twenty States† have imposed sales taxes which, like the one at bar, are consumers' taxes.

---

* Proof that an emergency still exists in New York is found in the titles of two Acts signed by Governor LEHMAN on March 20, 1941. New York Laws of 1941, ch. 135 and ch. 137.

† A list of the statutes of these twenty States will be found in Appendix B, *post*, p. 50.

(3)

In 1934, Congress tried to come to the relief of municipalities by enabling them to file petitions in bankruptcy. Act of May 24, 1934, 48 Stat. 708. The statute was, to be sure, held unconstitutional in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513 (1936). As amended by the Act of August 16, 1937, 50 Stat. 653, however, the legislation was upheld. *United States* v. *Bekins*, 304 U. S. 27 (April 25, 1938).

It would convict the members of Congress of singular ineptitude if, after having exhibited such persistence in their effort to relieve municipalities, they were deemed (in the Act of June 22, 1938, 52 Stat. 874, passed less than two months after success had crowned their efforts) to have placed municipalities under the handicap of enjoying a less extensive priority in enforcing tax claims in bankruptcy than had previously been theirs. A holding that *New York City* v. *Goldstein*, 299 U. S. 522 (1937), has ceased to be authoritative since the passage of the Act of June 22, 1938, is therefore, a result to be avoided.

The debates, moreover, also implement what we have just stated. Congress in the debates on the bill which later became the Act of August 16, 1937, showed (81 Cong. Rec., part 6, p. 6313) an awareness of the impotence of the taxing power of the average municipality to afford adequate relief in times of emergency. In later amending this Act by the Act of June 22, 1938 (52 Stat. 840, at p. 940), which is the very Act by which the priority section was amended (see *supra*, p. 10), they cannot have intended to effect a deliberate impairment of the already inadequate taxing power by making tax collections in bankruptcy more difficult.

We may further reenforce our argument by pointing to the circumstance that before the adoption of the 1938 amend-

ment, legislation had been adopted not only in New York City but in approximately 19 States, providing for retail sales taxes and imposing upon vendors the duty to collect the taxes from customers and transmit them to the authorities. While judicial decisions that what a vendor owed under these circumstances he owed *qua* tax, had, prior to 1938, been handed down in only two States, *Doby* v. *State Tax Commission*, 234 Ala. 150, 153, 174 So. 233 (1937), and *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), which was followed in *New York City* v. *Goldstein*, 299 U. S. 522 (1937), yet it is not too much to say that the respective legislatures probably assumed that such would be the ultimate holding of the Courts—an assumption which has been borne out by the cases cited *supra*, pp. 23-24, and of which there is every reason to suppose that Congress was aware.

Conclusion.

The order of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to allow the asserted priority.

New York, N. Y., April 23, 1941.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

BLANK PAGE

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24 *

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.

2. Imposition of tax.

* Erroneously numbered "25" in the compilation published at Albany.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for comsumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

---

* See footnote, *ante*, p. 34.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of

taxes by a vendor shall, as far as practicable, equal two per centum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive.* If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

---

* See footnote, *ante*, p. 34.

Appendix A

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when

filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer

or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned and unsatisfied.

§ 9. **Notices and limitations of time.** Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person

upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. **Administration of oaths and compelling testimony.** The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

Appendix A

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of registration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return,

certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the

custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

The following state statutes had, prior to June 22, 1938, the date of the enactment of the Chandler Act, established sales taxes substantially similar to the tax at bar and requiring the retailer to collect the tax from the purchaser:

Alabama	L. 1936-37 (Extra Session), p. 125
Arkansas	L. 1935, Act 233
Kansas	L. 1937, ch. 374
Kentucky	L. 1934, Special Session, ch. 25
Louisiana	L. 1936, Act 75
Mississippi	L. 1934, ch. 119 as amended by L. 1936, ch. 155
Missouri	L. 1937, p. 552
North Carolina	L. 1933, ch. 445
North Dakota	L. 1935, ch. 276
Ohio	L. 1934, part 2, p. 306
Oklahoma	L. 1935, p. 308
South Dakota	L. 1935, ch. 205
Utah	L. 1933, ch. 63
Washington	L. 1935, ch. 180
West Virginia	L. 1933, ch. 66
Wyoming	L. 1935, ch. 74

The following state statutes provide that the retailer must collect the tax from the purchaser "in so far as the same could be done" and forbid the retailer to advertise that he was absorbing the tax:

Colorado	L. 1935, ch. 189
Iowa	L. 1934, ch. 82

The following state statutes allow the retailer to reimburse himself by adding the tax to the sales price, but forbid him to advertise that the tax had been absorbed:

Arizona	L. 1935, ch. 77
Michigan	L. 1933, ch. 167
New Mexico	L. 1935, ch. 73, as amended by L. 1937, ch. 192

BLANK PAGE

BLANK PAGE

FILE COPY

(28545)

Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy
of NATIONAL STUDIOS, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

May 3, 1941.

WILLIAM C. CHANLER,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

BLANK PAGE

Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

REPLY BRIEF FOR PETITIONER.

1. It is quite consistent to call the purchaser the taxpayer where the inquiry is into the incidence of the ultimate burden of the tax, and yet to contend at the same time that what the vendor (who has, or should have, collected the tax from his customers) owes the authorities he owes *qua* tax.

(a)

A meticulous doctrinaire consistency has never been an outstanding characteristic of tax jurisprudence. A Justice of this Court observed, not so very long ago, that "Logic and taxation are not always the best of friends." *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 522 (1923). Yet when we consider the universality with which is acknowledged the principle that "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States,* 295 U. S. 247, 259 [1935]), it is not difficult to evolve, by inductive reasoning, a subjacent consistency in the decisions, which surface disharmonies obscure but do not destroy.

So here we again urge the Court to recognize the consistency of purpose beneath the superficially divergent arguments we are said to have made in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), on the one hand and in the instant case on the other. In the one case we sought to show the absence, in our system of local laws for sales tax collection, of any real burden on interstate commerce, since the burden of the tax, *i. e.*, the financial burden, fell not on the seller, who *was* engaged in interstate commerce, but on the purchaser who either *was not* so engaged, or proposed to use the articles (whose purchase by him was taxed) in interstate commerce only after they had become blended with the mass of property within the State. In the other case we seek to show that a vendor owes what he has or should have collected from purchasers *qua* tax and not *qua* debt even though as far as his own financial position is concerned he is not out-of-pocket the amount of the tax—having performed his duty of transferring the burden to the purchaser. This may still be true even though the Court hestitates to label him "taxpayer."

We submit that in the last analysis we are doing nothing more than resisting an attempt to impale upon the horns of a dilemma the sovereign authority * whom we represent.

The obvious purpose behind the provisions of the local laws requiring vendors to state the price separately to their customers, and to collect the tax from them, was efficiency of administration. Had the City resorted to the device of exacting returns from each purchaser, the expense of audit would have exceeded the revenue. *Cf.* JACOBY, *Retail Sales Taxation* (1938), page 100. When, therefore, the local leg-

---

* We use the word "sovereign" advisedly and with proper sanction. *Matter of Atlas Television Co.*, 273 N. Y. 51, 57-58 (1936). See also *New York Steam Corp.* v. *City of New York*, 268 N. Y. 137, 145 (1935).

islature required vendors to make collections and lump them in a single return, to be filed by the vendor and to reflect his dealings with *all* his customers, no intent can be found, directly or by implication, to tolerate a diminution in the dignity of the claim against the vendor from the lofty status of a tax to the inferior status of a debt. Courts do not readily impale the sovereign on the horns of a dilemma, nor do they say "You must either exact multitudinous returns from separate purchasers or cease to claim for what the vendor owes you the rank of a claim for taxes." As Judge POUND once said in another connection: "Sovereignty is not thus dealt with." *Nitro Powder Co.* v. *Agency of Canadian Car & Foundry Co.*, 233 N. Y. 294, 298 (1922).*

(b)

The respondent's reliance (brief, p. 12) upon *Matter of General Merchandising Corp.*, 32 Fed. Supp. 805 (E. D. Pa., 1940), is misplaced. We deem the opinion an authority favorable *to us*, for two reasons: (1) it analyzes the *Atlas* case and concludes that in New York what the vendor owes he owes *qua* tax; (2) it finds that under the Philadelphia sales tax ordinance † the vendor has been held, by the state court of last resort, to be a collector, and that such holding

---

* Especially, we may add, in administering laws designed to enable the sovereign to cope with an emergency. See page 27 of our main brief; and see *Builders Club of Chicago* v. *United States*, 83 Ct. Cl. 556, 14 F. Supp. 1020 (1936) where the Court said (p. 560): "A construction of a statute which produces a consequence opposed to the spirit of the legislation is to be avoided if possible. The language of the act is to be read in the light of its policy." *Cf.* the dissenting opinion of CARDOZO, J., in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, 541 (1936).

† We need not detain this Court with an analysis of the Philadelphia ordinance. Suffice it to say that it expressly provided, *inter alia*, for the compensation of the vendor (through a percentage of the collections) for his services to the City *as collector*. *Blauner's Inc.* v. *Philadelphia*, 330 Pa. St. 342, 347-348, 198 Atl. 889 (1938).

is binding on the federal court. It follows syllogistically that a federal court sitting in New York ought to have deemed itself bound under the *Atlas* case (273 N. Y. 51) to hold that what the vendor owes he owes *qua* tax.

2. Any doubts raised by equivocal dicta in decisions of the Court of Appeals of New York have been dispelled by the *Brown Printing* case.

We readily admit that an occasional phrase in certain decisions of the Court of Appeals (see our main brief, p. 17, and the respondent's brief pp. 8-11), tend, especially when torn from their context, to cast doubt on our main thesis.

But we beg leave once more to assure the Court, with emphasis, that whatever doubts which might ever have been raised by these dicta, have been dispelled by the decision in *Matter of Brown Printing Co.*, 285 N. Y. 47 (1941), main brief, page 18. In an insolvency proceeding brought in conformity with state statutes, the insolvent belonging (like the bankrupt at bar)* to the genus of a retail merchant, conflicting claims to priority were put forward by the State of New York, with an unpaid franchise tax, and by the City of New York, with claims for sales taxes which had, or should have, been collected from customers, but which had never been handed over to the Comptroller. The Court of Appeals cut the Gordian knot by declaring parity of priority between the two claims, thereby recognizing that both were owing *qua* tax and not *qua* debt. This result would have been inconceivable under the established law of New York (see *Matter of Northern Bank of New York*, 212 N. Y. 608

* Actually the bankrupt was a film leasing agency, but the leases traded in were taxable like sales, under local law. See *Matter of United Artists Corp.* v. *Taylor*, 273 N. Y. 334 (1937).

[1914], main brief p. 20) had the City's claim not been for taxes; so that its character as such would seem to us to have been impregnably fortified by its attainment of parity with the State's claim for franchise taxes.

In *Matter of Torpedo Dress Corp.*, 285 N. Y., mem. p. 114 (1941), which the respondent (brief, p. 20) regards as virtually overruling the *Brown Printing* case though both decisions came down the same day, all that the Court of Appeals seemingly did was to hold * that the provision in the New York Labor Law (Consolidated Laws, ch. 31), § 522(6), added by L. 1937, ch. 142, p. 586, that claims for contributions to the unemployment insurance fund should (upon an insufficiency of assets) "have priority over all other claims, except taxes due the United States or the state of New York, and wages due for employment performed within the three months preceding such event [*i. e.*, the general assignment]", embraced taxes due the State directly and not taxes due to the City as agent for the State—a construction adopted, we assume, in furtherance of the special interests of the beneficiaries of the unemployment insurance fund, and not to be extended by implication beyond the special situation covered by the cited section of the Labor Law.

3. The policy behind the Chandler Act (52 Stat. 874) was to maintain sources of state and municipal revenue unimpaired.

Our arguments (brief, p. 28) as to the policy behind the Chandler Act have in no sense been answered by the respondent. He refers (brief, pp. 23-25) to the elimination by Congress of a number of state-conferred priorities in favor of certain classes of private claimants; and he says this was

* The decision was without opinion. So was the decision which it affirmed. 259 App. Div. 994. For the opinion in the Court of first instance, see 100 N. Y. L. J. 1479.

in pursuit of a desire to prevent them from consuming whole estates and leaving nothing to general creditors. But let us not forget that state taxes have been preferred since the day the original bankruptcy act was adopted, as we showed by the use of italics on page 10 of our main brief; and that nothing in the congressional document* cited by respondent (brief, pp. 24-25) indicates the slightest desire on the part of Congress to aid general creditors by altering the long established policy of conceding priority to claims for state taxes. It is even less likely that Congress intended to allow general creditors to enjoy the unmerited windfall of being able to augment their dividends through the bankrupt's virtual embezzlement (of course there was no *mens rea*) of funds (in this case $60 [R., 12]) earmarked for unemployment relief. This would seem a complete answer to what the respondent argues at page 25 of his brief.

Had Congress intended to accomplish a change of the law in this particular, it would surely have done so by changing the phraseology of §64(b)(6). But the Chandler Act, while renumbering §64(b)(6) to read §64(a)(4), leaves the substance of the language of this sentence unchanged, the crucial change being made in §64(b)(7), renumbered §64(a)(5).†

---

* Analysis of H. R. 12889, 74th Congress, 2nd Session, at p. 201.

† The law prior to the Chandler Act provided that the Court should "order the trustee to pay all taxes, legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: * * *". And paragraph (b) set up seven grades of priorities of which the sixth was "taxes payable under paragraph (a) hereof." They were and still remain subordinated to administration expenses and wage claims. Under the Chandler Act it is provided that "debts to have priority * * * and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * *."

We submit that whatever was viewed as a tax "legally due and owing * * * to any State or * * * municipality" before the amendment remains so after it.

It is the fact, as we have shown (main brief, p. 28), that an awareness of the necessity of coming to the relief of municipalities pervaded the debates in Congress on the Chandler Bill itself. We may, therefore, go further and say that in all probability nothing was further from the legislators' minds than the accomplishment of the worsening of their condition which would occur if the decision below were allowed to stand.

Conclusion.

The order of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to allow the asserted priority.

New York, N. Y., May 3, 1941.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

PAXTON BLAIR,
SOL CHARLES LEVINE,
MORRIS L. HEATH,
of Counsel.

BLANK PAGE

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of National Studios, Inc.

BRIEF OF RESPONDENT MICHAEL FEIRING, TRUSTEE IN BANKRUPTCY OF NATIONAL STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BENJAMIN SIEGEL,
Attorney for Michael Feiring, Trustee in Bankruptcy of National Studios, Inc., Respondent.

On the Brief:
BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN.

THE COURT PRESS, N. Y. C.

BLANK PAGE

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of National Studios, Inc.

BRIEF OF RESPONDENT MICHAEL FEIRING, TRUSTEE IN BANKRUPTCY OF NATIONAL STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The decision below is neither in conflict with applicable local law, nor is it in conflict with the decision of any other Circuit Court of Appeals on the same matter, and this case therefore presents no reason for the issuance of a writ of certiorari.

The Case Below.

In the Court below, the respondent herein contended as follows:

1. That under Section 64 of the Bankruptcy Act, as amended by 52 Stat. 840 (known as the Chandler Bill), *debts* owing to persons entitled to priority under the laws of the State are no longer entitled to priority in bankruptcy unless specifically granted by

the Bankruptcy Act and therefore, if the claim of the City is *qua* debt and not *qua* tax, it is not entitled to priority under the Bankruptcy Act, as amended.

2. That the claim of the City against a vendor is *qua* debt and not *qua* tax and the previous holding of the Circuit Court of Appeals (2nd Circuit) to that effect in *Matter of Lazaroff*, 84 Fed. (2d) 982, was not overruled by this court in its reversal of the *Lazaroff* case. (In the *Lazaroff* case certiorari was denied *sub nom., City of New York* v. *Goldstein*, 299 U. S. 583, but subsequently this court reversed 299 U S. 522, upon the authority of *Matter of Atlas Television Co.*, 273 N. Y. 51.)

3. That the subsequent interpretation of the City Sales Tax Law and of the *Atlas Television* case (*supra*) by the New York courts, and by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and in briefs heretofore submitted by petitioner herein, confirms respondent's contention that the tax is imposed upon the purchaser and not the vendor, whose obligation to the City is that of a tax collecting agent, as distinguished from a taxpayer.

The City of New York does not dispute that the amendment of Section 64 of the Bankruptcy Act nullifies the priority heretofore granted to debts entitled to priority by the laws of the State, and therefore the City is entitled to priority under the Bankruptcy Act only if its claim is *qua* tax and not *qua* debt.

POINT ONE.

There is no conflict with applicable local decisions.

The decision of the Circuit Court of Appeals in this case is not in conflict with the applicable local decisions and does not contravene the nearest applicable decisions in the highest court of the State and is not in conflict with *Matter of Lazaroff*, 84 Fed. (2d) 982 as reversed in 299 U. S. 522.

The issue as to whether the claim of the City was *qua* tax or *qua* debt was first determined by the Circuit Court of Appeals in *Matter of Lazaroff*, 84 Fed. (2d) 982. That case was decided prior to the amendment of Section 64 of the Bankruptcy Act (Chandler Bill). The Circuit Court denied priority and expressly held that the obligation was not a tax, nor such a debt which was entitled to priority by State Law, because the City of New York was not vested with the powers of a sovereign.

Certiorari in the *Lazaroff* case was denied (299 U. S. 583) but subsequently this Court granted a petition for re-hearing and in a *per curiam* opinion (299 U. S. 522) stated as follows:

> "January 18, 1937. *Per Curiam*: The motion for leave to file a petition for rehearing is granted. The order heretofore entered on October 26, 1936, denying the petition for writ of certiorari herein is vacated, and the petition for writ of certiorari is granted. The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Re*: *Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94 (decided December 31, 1936)."

The *Atlas Television* case arose in the State court in an assignment proceeding for the benefit of creditors. The City there urged as it did in the *Lazaroff* case that its claim for sales tax against the vendor was entitled to priority under the laws of the State of New York by virtue of its alleged sovereign powers in the exercise of the authority granted to it by the State, and also because it was a tax.

The New York Court of Appeals found that the equities in the case warranted granting priority to the City but in granting such priority, the Court did not squarely determine that it did so because the obligation was a tax, but merely held that the City was entitled to priority regardless of whether the obligation be characterized as a tax or a debt because even as a debt the City was entitled to priority as it was exercising a function of the State under authority of the State, and in its opinion, stated as follows:

(Page 57)

> "Whether the city is entitled to a priority depends upon whether its claim is that of the sovereign people, acting through the agency of the city, or is that of the city acting as a semi-private municipal corporation. Taxation is an attribute of sovereignty and the city acts as sovereign when it imposes an obligation upon its inhabitants to contribute to the expenses of government and when it collects that obligation. That is true no less if we denominate the obligation by some other term than 'tax', so long as it constitutes an obligation created by the sovereign to contribute to the expense of government. Distinctions resting solely in words should carry

here no legal consequences. We must look to the substance of the obligation."

(Page 58)

"* * * Though the vendor is required, at least in most cases, to collect the tax from the purchaser, 'for and on account of the City', the purpose of that provision is to place the incidence of the tax immediately on the consumer."

Had the Court of Appeals intended to decide that the claim of the City was for a tax as distinguished from a debt, it could have readily said so in unequivocal language, but this the Court did not do.

The subsequent reversal of the *Lazaroff* case by this Court was not therefore a determination that the obligation of the vendor was a tax, but we respectfully submit was only intended to follow and conform to the law of the State of New York enunciated by the New York Court of Appeals that the obligation of the vendor as a debt was entitled to priority under the laws of the State of New York, and therefore entitled to priority under the Bankruptcy Act then in force.

The foregoing interpretation of the effect of the reversal of the *Lazaroff* case, is supported by an examination of the petition which The City of New York submitted to this Court when it requested a re-hearing of the *Lazaroff* case. In that petition in referring to the *Atlas Television* case, it urged as follows:

"Your petitioner desires to point out, moreover, that even if the decision of a State Court on whether a claim is or is not a tax be deemed

not binding on the Bankruptcy Court, still the decision of the State Court that the City is 'a person who by the laws of the States * * * is entitled to priority' is very definitely binding on the bankruptcy court by 64(b) (7) of the National Bankruptcy Act."

It thus clearly appears that in its renewed application for certiorari, the City of New York urged a reversal on the ground, either that the obligation was a tax due and owing by the bankrupt, or was a debt which the New York Court of Appeals in the *Atlas Television* case held was entitled to priority under the laws of the State.

Respondent's contention that the tax is imposed upon the purchaser and not the vendor, is further supported by recent opinions of the New York Court of Appeals and by this Court in the following cases:

Matter of Kesbec, Inc. v. *McGoldrick,* 278 N. Y. 293;
Matter of Merchants Refrigerating Co. v. *Taylor,* 275 N. Y. 113;
McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

In *Matter of Kesbec, Inc.* v. *McGoldrick* (*supra*), the Court in interpreting the City Sales Tax Law stated, as follows:

(Page 297)

"* * * The sales tax was not imposed on the vendor. It fell upon the purchaser (*Matter of Merchants Refrigerating Co.* v. *Taylor,* 275 N. Y. 113, 124) * * *"

In *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*), this Court sustained the constitutionality of the City Sales Tax Law and stated, as follows:

(Page 43)

"* * * Another clause of Section 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city.

. . . . . .

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

(Page 44)

"The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts (*Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94, 34 Am. Bankr. Rep. (N. S.) 7; *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 9 N. E. (2d) 799; *Kesbec* v. *McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288, 119 A. L. R. 536)."

The appendix attached to the petition for certiorari does not set forth the complete text of the Local Law here involved and sections 1, 2, and 10 to 18 inclusive are omitted. Section 10 of the said Local Law, which governs an application for a refund of the tax, conclusively proves that the tax is imposed

upon the purchaser and not the vendor, and said section reads as follows:

> "Sec. 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. *Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made.*" (Italics ours.)

It is significant that the statute provides that the application for the refund may be made by "the person upon whom such tax was imposed or by the vendor * * * if such vendor establishes * * * that he has repaid to the purchaser the amount for which application for refund is made".

The only interpretation of such language is that the tax is imposed upon a person other than the vendor, and the New York Courts have so interpreted the statute, holding that the taxpayer is the purchaser and that the vendor is only a tax collector.

This was clearly held in *Socony-Vacuum Oil Co. Inc.* v. *City of New York,* 247 App. Div. 163, aff'd 272 N. Y. 668, wherein Mr. Justice Dore rendered the unanimous decision for the Appellate Division, and stated:

(Page 167)

> "The precedents cited by the city are readily distinguishable. They relate to remedies available to the *taxpayer,* whereas these plaintiffs are,

in truth, tax collectors, as the tax is assessed on and paid by the ultimate purchaser."

A similar conclusion was reached in *Matter of Kesbec* v. *McGoldrick* (*supra*). In that case a vendor had collected a sales tax based upon a formula furnished by the Comptroller and after collecting such tax paid the same to the Comptroller. The formula adopted by the Comptroller was thereafter declared illegal and upon a recomputation of the sales tax it appeared that the vendor had collected a sum in excess of the proper amount of the tax, and the vendor thereupon instituted a proceeding to recover the excess tax from the Comptroller to whom the vendor had paid the same.

The City resisted such application and in its brief urged that *the vendor was only a tax collector,* and by reason thereof was not the proper party to bring such a proceeding, as only a *taxpayer* could bring such a proceeding.

The Court of Appeals accepted the argument of the City and refused to return to the vendor the tax which the vendor had illegally collected and paid to the Comptroller, because the tax was not imposed upon the vendor but upon the purchaser, and held that the purchaser who was the taxpayer was the one who could apply for the refund.

If the vendor is a taxpayer, as the City now urges, then certainly the vendor would be entitled to an unconditional refund of a tax erroneously paid by him to the Comptroller, but this has been denied to the vendor both by the statute and the interpretation thereof by the New York Courts.

The case of *Queens Vending Corp.* v. *City of New York,* 94 N. Y. L. J. 318 (July 31, 1933), aff'd 246

App. Div. 594, cited by petitioner at page 15 of its brief herein, has no application, and does not conflict with the decision in this case, because in that case the issue was not raised as to whether the liability of the vendor was *qua* tax or *qua* debt. The court there merely determined that where the Comptroller pursuant to Section 3 of the Sales Tax Law, had fixed a price below which the vendor need not collect the tax from the purchaser, that the failure of the vendor to collect such tax from the purchaser on sales below such price, did not violate that portion of the Sales Tax Law which made it unlawful for the vendor to absorb the Sales Tax.

Matter of David Brown Printing Co. Inc., 285 N. Y. 47, cited by petitioner at page 18 of its brief, likewise did not decide whether the claim of the City of New York was *qua* tax or *qua* debt because such issue was not there involved. That case merely determined that in a proceeding arising in the State Court where an assignment for the benefit of creditors had been made, that the claim of the City for sales tax was on the same parity as the claim of the State of New York for franchise tax, upon the theory that both claims depend upon the same sovereign right and that the City was acting as the agent for the State. On the same day which the Court of Appeals rendered its decision in *Matter of David Brown Printing Co. Inc.* (*supra*) it affirmed *Matter of Torpedo Dress*, 285 N. Y. — (March 6, 1941) which held that a claim of the State of New York for unemployment insurance taxes is entitled to priority over the claim of the City for sales tax, thus negativing the implication that the claim of the City is one for taxes entitled to the same parity as all taxes imposed by the State.

Jensen Candy Co. v. *State Tax Commission,* 90 Utah 359, cited at page 15 of petitioner's brief, although not of local origin, nevertheless has no application because an examination of the opinion in that case discloses that the issue as to whether the obligation was a tax or a debt was not considered and the statute there involved is substantially different than the one at bar.

It conclusively appears from the foregoing that there is no conflict with the local decisions which have all held that the tax is imposed upon the purchaser and not the vendor.

POINT TWO.

The position now taken by petitioner is in direct conflict with its position heretofore taken before this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33.

In the footnote at page 5 of the petition for certiorari herein, the City states:

> "As we show *post,* p. 19, we are not in any sense going back on the position we took at the bar of this court in the *Berwind-White* case."

We have carefully examined the brief submitted by the City in the *Berwind-White* case and are respectfully of the opinion that the City is definitely going back on the position which it took before this court in the *Berwind-White* case and is now taking a diametrically opposite view.

To support our contention we quote the following excerpt from the brief heretofore submitted by the

City of New York to this court in the *Berwind-White* case:

(At page 7 of Brief)

"The tax is imposed not on the seller but on the buyer. The statute makes this abundantly clear and the courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).

The statute provides that the tax is payable 'by the purchaser to the vendor, for and on account of the City of New York' (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has 'the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service' (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2)."

(At page 43 of Brief)

"B. THE TAX IS IMPOSED NOT UPON THE SELLER BUT UPON BUYERS LOCAL TO NEW YORK WHO CANNOT BE TAXED IN ANY OTHER STATE.

Quite apart from the local nature of the taxable event, there is another reason why this tax

cannot be imposed in more than one state. The taxpayer is not the seller, but the local purchaser."

The foregoing statements were made by the City of New York in its brief in the *Berwind-White* case filed in this Court, and the position taken therein was followed by this Court when it sustained the constitutionality of the City Sales Tax, basing its opinion upon the fact that the tax as such was imposed on the purchaser and not the vendor, and that therefore there was no interference with interstate commerce.

Mr. Chief Justice Hughes dissented from the majority opinion of this Court because he rejected the argument of the City that the tax was upon the purchaser and stated in his dissenting opinion as follows:

(Page 61)

"If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

This dissenting opinion emphasizes in bold relief the force of the majority opinion in holding that the tax was imposed on the purchaser and not the vendor, and that the City of New York is now taking a position entirely inconsistent with and diametrically opposed to that taken by it in the *Berwind-White* case.

To now hold that the tax is imposed upon the vendor would be inconsistent with the decision of this Court in the *Berwind-White* case, and would cast doubt upon the decision of this Court declaring the City Sales Tax Law to be constitutional.

Any doubt as to the constitutionality of the act would render greater damage to the City of New York, than a reversal of the decision of the Court below in this case. Public policy does not require such reversal.

POINT THREE.

There is no conflict with the decision in the Tenth Circuit in *Barbee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114.

The decision of the Circuit Court of Appeals in the case below does not conflict with the decision in the Tenth Circuit in *Barbee* v. *Oklahoma Tax Commission* (*supra*) and we advance two reasons therefor as follows:

I.

The first reason is that *Barbee* v. *Oklahoma Tax Commission* (*supra*) was decided under the Bankruptcy Act as it existed prior to its amendment, whereas the instant case was decided under the statute as amended.

The opinion of the District Court in *Barbee* v. *Oklahoma Tax Commission* (reported *sub nom. Matter of Kanaly*, 23 F. Supp. 995, 37 A. B. R. (N. S.) 588) quotes the section of the Bankruptcy Act under which the claim of priority was made in that case as follows:

> "The section of the Bankruptcy Act under which the claim for priority is asserted by the tax commission in this case is section 64, 11 U. S.

C. A. Sec. 104, and the relevant parts of such section are quoted as follows:

> '(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof. * * * The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: Provided, That the term "person" as used in this section shall include corporations, the United States and the several states and territories of the United States.'
>
> The question for determination is whether or not the claim for taxes, collected by the vendor, under the Bankruptcy Act, *constitutes a debt which is entitled to priority.*" (Italics ours.)

The foregoing language is the language of the Bankruptcy Act prior to its amendment under the Chandler Bill. The amended statute omits the words "the states or" and the amended section is now contained in Section 64, subdivision 5, of the Bankruptcy Act, reading as follows:

> "Debts owing to any person including the United States, who by the laws of the United States is entitled to priority * * *."

The issue, therefore, which was decided in *Barbee* v. *Olkahoma* (*supra*) was not whether the claim of the State of Oklahoma was a tax, but as the District Court there said whether the claim *"constitutes a debt which is entitled to priority"*.

II.

The second reason is that the Oklahoma Sales Tax Law (Section 3, article 7, chapter 66, Session Laws 1935) expressly defines who is the taxpayer, as follows:

> "The term 'taxpayer' shall mean any person liable for any tax hereunder."

In the instant case, the New York statute does not define the term "taxpayer". However, the statute has been construed both by the New York courts and by this very petitioner as making the purchaser the taxpayer and the vendor only a tax collector.

POINT FOUR.

Whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a Federal question to be determined by the Bankruptcy Court.

One of the questions which the City presents in its petition for certiorari is as follows (p. 7):

> "(2) Was the Circuit Court of Appeals warranted in rejecting the authority of decisions of the New York Courts defining the retailer's obligation in the premises as a tax?"

We respectfully submit that the New York Courts have not defined the vendor's obligation as a tax, and the Circuit Court has not therefore rejected the authority of the New York cases.

Assuming *arguendo*, that the Circuit Court had rejected such authority, we submit that such re-

jection is proper because whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a Federal question to be determined by the Bankruptcy Court.

The principle long established in *Swift* v. *Tyson,* 16 Pet. 1, 10 L. ed. 865, that the Federal Court is not bound to follow the law of the State was recently overruled by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, wherein this court held that the Federal Court was bound to follow the law of the State on all questions, *except* in matters governed by the Federal Constitution or by the Acts of Congress, and Mr. Justice Brandeis who delivered the opinion for the Court stated at page 78, as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

The instant case involves the interpretation of an Act of Congress because the City is seeking priority not by virtue of any State law but by reason of a claim asserted under the Acts of Congress relating to bankruptcy.

Under Section 64a (4) of the Bankruptcy Act, the amount and legality of tax claims must be determined by the Bankruptcy Court, and in *New Jersey* v. *Anderson,* 203 U. S. 483, this Court interpreted this section, as follows:

(Pages 491 and 492)

> "* * * a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law

providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this Court."

Regardless of the interpretation of the *Atlas Television* case, the issue whether the tax imposed by the City Sales Tax Law does in fact constitute a tax upon a vendor within the meaning of the Bankruptcy Act giving preference to taxes, is a Federal question to be determined exclusively by the Federal Court, and the determination of the State Court with respect thereto is not conclusive in that respect.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

BENJAMIN SIEGEL,
Attorney for Michael Feiring, Trustee in Bankruptcy of National Studios, Inc., Respondent.

On the Brief:
BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN.

BLANK PAGE

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

BRIEF OF TRUSTEE, RESPONDENT.

BENJAMIN SIEGEL,
Attorney for Trustee, Respondent.

BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN,
On the Brief.

THE COURT PRESS, N. Y. C.

BLANK PAGE

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

BRIEF OF TRUSTEE, RESPONDENT.

The Issue Involved and Questions Raised.

The bankrupt sold goods at retail to its customers. The City of New York, petitioner herein, filed a proof of debt for "taxes" under the New York City Sales Tax, known as Local Law 24 of 1934, and hereinafter referred to as Local Law. The City of New York and the Trustee in Bankruptcy stipulated that the amount of said claim was $796 of which only the sum of $60 in taxes was collected by the bankrupt from its customers, and no part thereof came into the possession of the Trustee in Bankruptcy (R. 12).

The City of New York demanded priority of payment of said claim and the Trustee objected thereto.

The learned Referee in Bankruptcy, after finding that the obligation to the City of New York was a tax legally due and owing by the bankrupt, further determined as follows:

> "Had the City of New York elected to claim for the vendor's liability as its collection agent its claim could

have been allowed only as a general claim. The objection of the trustee is therefore overruled and the claim allowed as a tax claim entitled to the priority granted by Section 64(a) of the Bankruptcy Act" (R. 15).

The District Court reversed the Referee and the Circuit Court of Appeals sustained the District Court, holding that the City's claim was for a debt and not a tax and denied priority.

Respondent contends that said claim is not entitled to priority of payment under the Bankruptcy Act for reasons as follows:

1. Under Section 64(a) of the Bankruptcy Act, as amended by 52 Stat. 874 (known as the Chandler Act) *debts* owing to persons entitled to priority under the laws of the State, except to a landlord, are no longer entitled to priority in bankruptcy.

2. The claim of the City of New York is for a debt and not a tax and the previous holding of the Circuit Court of Appeals (2nd Circuit) to that effect in *Matter of Lazaroff*, 84 Fed. (2d) 982, was not overruled by this Court in its reversal of the *Lazaroff* case and that such reversal was not a determination that the obligation of the vendor under the Local Law was a tax.

3. The subsequent interpretation of the Local Law and *Matter of Atlas Television Co.*, 273 N. Y. 51, by the New York Courts, and by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and in briefs heretofore submitted by petitioner, confirms respondent's contention that the tax is imposed upon the purchaser and not the vendor, whose obligation to the City is that of a tax collecting agent, as distinguished from a taxpayer.

4. The Bankruptcy Act was deliberately amended to eliminate State priorities in view of the ever mounting priority claims.

5. Public policy does not warrant a reversal of the judgment of the Court below.

POINT I.

Debts owing to persons entitled to priority under the laws of a state are no longer entitled to priority under the Bankruptcy Act as amended by the Chandler Act.

Section 64(b)6 of the Bankruptcy Act prior to its amendment under the Chandler Act granted priority to taxes, and Section 64(b)7 granted priority to certain debts (after taxes) as follows:

> "debts owing to any person who by the laws of the States or the United States is entitled to priority."

Under this provision a debt owing to a person entitled to priority by State Law was allowed priority in bankruptcy.

The Chandler Act amended this provision as to debts entitled to priority, by omitting the words "the State or" and the amended provisions of the Bankruptcy Act, insofar as they pertain to taxes and debts entitled to priority, are now contained in Section 64(a) subdivisions 4 and 5 as follows:

> "Sec. 64(a).—The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be
>
> * * *

(4) Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and

(5) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

The effect of this amendment is to withdraw priority in bankruptcy from a debt even though such debt is allowed priority by State Law except as to a landlord's claim.

POINT II.

The claim of the City of New York against a vendor for Sales Tax under the Local Law is a debt and not a tax.

The very provisions of the Local Law cogently tend to establish that the tax is imposed upon the purchaser and not the vendor and that the obligation of petitioner is therefore for a debt and not a tax. Such provisions are as follows:

"the tax to be collected shall be stated and charged separately from the sale price * * * and shall be paid by

the purchaser to the vendor, for and on account of the city of New York * * *" (Sec. 2).

"Where a purchaser has failed to pay and a vendor has failed to collect a tax * * * then * * * such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered" (Sec. 2).

"The comptroller may, * * * provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed * * *" (Sec. 2).

"The comptroller may require any vendor required to collect the tax * * * to file with him a bond * * * as to solvency * * * to secure the payment of any tax * * *" (Sec. 6).

"The comptroller shall refund any tax erroneously or illegally collected and paid * * *. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller, if such vendor establishes to the satisfaction of the comptroller * * * that he has repaid to the purchaser the amount for which application for refund is made" (Sec. 10).

"* * * every vendor required to collect the tax * * * shall file with the comptroller a certificate of registration * * * who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser * * *" (Sec. 14).

Section 15 provides that the vendor may not absorb the tax and renders the vendor subject to criminal penalties in the event he fails to collect the tax from the purchaser.

The issue as to whether the claim of the City is for a tax or a debt was first determined in *Matter of Lazaroff* (C. C. A. 2nd Cir.), 84 Fed. (2d) 982. That case was de-

cided prior to the amendment of Section 64 of the Bankruptcy Act by the Chandler Act. The Circuit Court denied priority and expressly held that the obligation was not a tax, nor such a debt which was entitled to priority by State Law.

Certiorari in the *Lazaroff* case was denied (299 U. S. 583) but subsequently this Court granted a petition for re-hearing and in a *per curiam* opinion (299 U. S. 522) stated as follows:

> "January 18, 1937. *Per Curiam*: The motion for leave to file a petition for rehearing is granted. The order heretofore entered on October 26, 1936, denying the petition for writ of certiorari herein is vacated, and the petition for writ of certiorari is granted. The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Re*: *Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94 (decided December 31, 1936)."

The *Atlas Television* case arose in the State court in an assignment proceeding for the benefit of creditors. The City there urged as it did in the *Lazaroff* case that its claim for sales tax against the vendor was entitled to priority under the laws of the State of New York by virtue of its alleged sovereign powers in the exercise of the authority granted to it by the State, and also because it was a tax.

The New York Court of Appeals found that the equities in the case warranted granting priority to the City, but in granting such priority, the Court did not squarely determine that it did so because the obligation was a tax, but merely held that the City was entitled to priority regardless of whether the obligation be characterized as a tax or a debt because even as a debt the City was entitled

to priority as it was exercising a function of the State under authority of the State, and in its opinion, stated as follows:

(Page 57)

"Whether the city is entitled to a priority depends upon whether its claim is that of the sovereign people, acting through the agency of the city, or is that of the city acting as a semi-private municipal corporation. Taxation is an attribute of sovereignty and the city acts as sovereign when it imposes an obligation upon its inhabitants to contribute to the expenses of government and when it collects that obligation. That is true no less if we denominate the obligation by some other term than a 'tax', so long as it constitutes an obligation created by the sovereign to contribute to the expense of government. Distinctions resting solely in words should carry here no legal consequences. We must look to the substance of the obligation."

(Page 58)

"* * * Though the vendor is required, at least in most cases, to collect the tax from the purchaser, 'for and on account of the City', the purpose of that provision is to place the incidence of the tax immediately on the consumer."

Had the Court of Appeals intended to decide that the claim of the City was for a tax as distinguished from a debt, it could have readily said so in unequivocal language, but this the Court did not do.

We, therefore, respectfully urge that the subsequent reversal of the *Lazaroff* case by this Court was not a determination that the obligation of the vendor was a tax, but was only intended to follow and conform to the law of the State of New York enunciated by the New York

Court of Appeals that the obligation of the vendor as a debt was entitled to priority under the laws of the State of New York, and therefore entitled to priority under the Bankruptcy Act then in force.

The foregoing interpretation of the effect of the reversal of the *Lazaroff* case, is supported by an examination of the petition which The City of New York submitted to this Court when it requested a re-hearing of the *Lazaroff* case. In that petition in referring to the *Atlas Television* case, it urged as follows:

> "Your petitioner desires to point out, moreover, that even if the decision of a State Court on whether a claim is or is not a tax be deemed not binding on the Bankruptcy Court, still the decision of the State Court that the City is 'a person who by the laws of the States * * * is entitled to priority' is very definitely binding on the bankruptcy court by 64(b) (7) of the National Bankruptcy Act."

It thus clearly appears that in its renewed application for certiorari to this Court, the City of New York urged a reversal on the ground, either that the obligation was a tax due and owing by the bankrupt, or was a debt which the New York Court of Appeals in the *Atlas Television* case held was entitled to priority under the laws of the State.

Respondent's contention that the tax is imposed upon the purchaser and not the vendor, is further supported by recent opinions of the New York Court of Appeals and by this Court in the following cases:

Matter of Kesbec, Inc. v. *McGoldrick,* 278 N. Y. 293;

Matter of Merchants Refrigerating Co. v. *Taylor,* 275 N. Y. 113;

Matter of United Autographic Reg. Co. v. *McGoldrick,* 260 App. Div. 157, affirmed without opinion, 285 N. Y. 19;
McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

In *Matter of Kesbec, Inc.* v. *McGoldrick* (*supra*), the Court in interpreting the Local Law stated, as follows:

(Page 297)

"* * * The sales tax was not imposed on the vendor. It fell upon the purchaser (*Matter of Merchants Refrigerating Co.* v. *Taylor,* 275 N. Y. 113, 124) * * *"

In *Matter of United Autographic Register Co.* v. *McGoldrick,* 260 App. Div. 157, affirmed 285 N. Y. 19, Mr. Justice Dore, who rendered the majority opinion for the Appellate Division construed the Local Law as follows:

"The ultimate burden of the sales tax in question both in form and in substance is a tax (measured by the sales price) upon the New York city purchaser of the petitioner's commodities and not on the vendor, petitioner herein. * * * The *taxpayer* in this case is not the petitioner, an Illinois corporation, but the New York city purchaser." (Italics ours.)

In *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*), this Court sustained the constitutionality of the New York City Sales Tax Law and stated, as follows:

(Page 43)

"* * * Another clause of Section 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city.

* * * * * * * *

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

(Page 44)

"The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts (*Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94, 34 Am. Bankr. Rep. (N. S.) 7; *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 9 N. E. (2d) 799; *Kesbec* v. *McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288, 119 A. L. R. 536)."

Section 10 of the Local Law, which governs an application for a refund of the tax, defines the person upon whom the tax is imposed as being one other than the vendor, and said section reads as follows:

"Sec. 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. *Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made.*" (Italics ours.)

It is significant that the statute provides that the application for the refund may be made by "the person upon whom such tax was imposed or by the vendor * * * if such vendor establishes * * * that he has repaid to the

purchaser the amount for which application for refund is made".

The only logical interpretation of such language is that the tax is imposed upon a person other than the vendor, and the New York Courts have so interpreted the statute, holding that the taxpayer is the purchaser and that the vendor is only a tax collector.

This was clearly held in *Matter of United Autographic Register Co.* v. *McGoldrick* (*supra*), wherein Mr. Justice Dore said:

> "The taxpayer in this case is not the petitioner, an Illinois corporation, but the New York city purchaser."

To the same effect see *Socony-Vacuum Oil Co. Inc.* v. *City of New York*, 247 App. Div. 163, aff'd 272 N. Y. 668.

A similar conclusion was reached in *Matter of Kesbec* v. *McGoldrick* (*supra*). In that case a vendor had collected a sales tax based upon a formula furnished by the Comptroller and after collecting such tax paid the same to the Comptroller. The formula adopted by the Comptroller was thereafter declared illegal and upon a recomputation of the sales tax it appeared that the vendor had collected a sum in excess of the proper amount of the tax, and the vendor thereupon instituted a proceeding to recover the excess tax from the Comptroller to whom the vendor had paid the same.

The City resisted such application and in its brief urged that *the vendor was only a tax collector*, and by reason thereof was not the proper party to bring such a proceeding, as only a *taxpayer* could bring such a proceeding.

The Court of Appeals accepted the argument of the City and refused to return to the vendor the tax which the vendor had illegally collected and paid to the Comptroller, because the tax was not imposed upon the vendor but

upon the purchaser, and held that the purchaser who was the taxpayer was the one who could apply for the refund.

If the vendor is a taxpayer, as the City now urges, then certainly the vendor would be entitled to an unconditional refund of a tax erroneously paid by him to the Comptroller, but this has been denied to the vendor both by the statute and the interpretation thereof by the New York Courts.

The decision of the Circuit Court of Appeals in this case is not without precedent.

See

Nolte v. *Hudson Navigation Co.* (C. C. A. 2nd Cir.), 8 F. (2d) 859;
Commonwealth of Pennsylvania v. *York Silk Mfg. Co.*, 192 Fed. 81;
In re Waller, 142 Fed. 883;
In re General Merchandise Corporation of America (D. C. Penn.), 32 F. Supp. 805.

In re General Merchandise Corporation of America (*supra*) involved the Philadelphia Sales Tax Law which for all practical purposes is the same as the Local Law. The District Court disallowed priority of a claim of the City of Philadelphia for sales tax against the estate of a bankrupt vendor upon the ground that the tax was upon the purchaser and not the vendor. The District Court followed the decision of the Supreme Court of Pennsylvania in *Blauner's, Inc.* v. *Philadelphia*, 330 Pa. 340 which held that the purchaser was the taxpayer and the vendor was the tax collector.

The opinion in the case at bar has since been cited with approval by the Circuit Court of Appeals for the Second Circuit by a unanimous court *In re Independent Automobile*

Forwarding Corp. (decided March 17, 1941), F. (2d) . (Bankruptcy Law Service C. C. H. ¶53081.)

The question there involved was whether the obligation imposed upon an employer under Title VIII (Social Security Act) to deduct a certain per cent. from the wages of the employee and to pay the same to the United States, created a *debt* or a *tax* due and owing to the United States within the meaning of Section 64(a) (4) of the Bankruptcy Act. Title VIII imposed a tax upon wages of employees, and required that, "The tax imposed by Section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax * * *." In holding that the obligation thus created upon the employer was a *debt* and not a *tax*, the court stated as follows:

> "This part of the Social Security Act laid a tax upon the employees of this bankrupt measured by a percentage of their wages and not a tax upon the bankrupt. It was taxed to a like extent under Sec. 804 of Title VIII and the two taxes put the burden of social betterment upon both the employer and the employees. As to that part of these taxes which were thus imposed upon the employees the employer was, indeed, made a compulsory tax collector and made liable for the payment of such tax. The employer, however, was liable only as an agent bound to pay whether its duty to collect was performed or not. Such liability for a debt, instead of for taxes due and owing the government, does not form the basis of a claim entitled to priority under Sec. 64(a) (4). *Gulf Oil Corp.* v. *Grady*, 119 F. (2d) 178 (C. C. A. 2) (¶52,300); *The City of New York* v. *Feiring, Trustee,* F. (2d) (C. C. A. 2) decided March 1941; *In re General Merchandise Corporation of America,*

32 F. Supp. 805 (¶52,466). Accordingly the taxes assessed under Sec. 801 of Title VIII of the Social Security Act were erroneously allowed as a prior claim."

By analogy the Social Security Act and the Local Law are comparable because under both statutes the bankrupt is required to collect the tax from a third person and to pay the same to the taxing authority.

The foregoing decision dispels the argument of petitioner that where the obligation is imposed upon a debtor without his volition, there can be no distinction between a debt and a tax.

Petitioner's position, if we understand it correctly, is that all expressions of the various courts on the issue as to who is the taxpayer under the Local Law, are *dicta*, as the Courts were merely referring to the "incidence of the tax."

Dicta generally expressed and accepted by all Courts should have the force of an opinion.

This Court held in *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*) that:

(Page 43)

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

But assuming that these expressions only relate to the "incidence of the tax", this Court in *Colorado National Bank* v. *Bedford*, 310 U. S. 41, enunciated the principle that:

(Page 52)

"The determination of the State Court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling."

POINT III.

The argument now advanced by petitioner is in direct conflict with its position heretofore taken before this Court in *McGoldrick* v. *Berwind-White Coal Mining*, 309 U. S. 33.

We have carefully examined the brief submitted by the City in the *Berwind-White* case and are respectfully of the opinion that the City is definitely "going back" on the position which it took before this Court in the *Berwind-White* case and is now taking a diametrically opposite view.

To support our contention we quote the following excerpts from the brief heretofore submitted by the City of New York to this Court in the *Berwind-White* case:

(At page 7 of Brief)

> "The tax is imposed not on the seller but on the buyer. The statute makes this abundantly clear and the courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).
>
> The statute provides that the tax is payable 'by the purchaser to the vendor, for and on account of the City of New York' (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has 'the same right in respect to collecting the tax from the purchaser, or in respect to nonpayment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service' (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It

is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2)."

(At page 43 of Brief)

"B. THE TAX IS IMPOSED NOT UPON THE SELLER BUT UPON BUYERS LOCAL TO NEW YORK WHO CANNOT BE TAXED IN ANY OTHER STATE.

Quite apart from the local nature of the taxable event, there is another reason why this tax cannot be imposed in more than one state. The taxpayer is not the seller, but the local purchaser."

The foregoing statements were made by the City of New York in its brief in the *Berwind-White* case filed in this Court, and the position taken therein was followed by this Court when it sustained the constitutionality of the Local Law, basing its opinion upon the fact that the tax as such was imposed on the purchaser and not the vendor, and that therefore there was no interference with interstate commerce.

Mr. Chief Justice Hughes dissented from the majority opinion of this Court because he rejected the argument of the City that the tax was upon the purchaser and stated in his dissenting opinion as follows:

(Page 61)

"If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

This dissenting opinion emphasizes in bold relief the force of the majority opinion in holding that the tax was imposed on the purchaser and not the vendor, and that the City of New York is now taking a position entirely inconsistent with and diametrically opposed to that taken by it in the *Berwind-White* case.

To now hold that the tax is imposed upon the vendor would be inconsistent with the decision of this Court in the *Berwind-White* case, and would cast doubt upon the decision of this Court declaring the Local Law to be constitutional.

POINT IV.

Whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a federal question to be determined by the Bankruptcy Court.

The principle long established in *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865, that the Federal Court is not bound to follow the law of the State was recently overruled by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, wherein this Court held that the Federal Court was bound to follow the law of the State on all questions, *except* in matters governed by the Federal Constitution or by the Acts of Congress, and Mr. Justice Brandeis who delivered the opinion for the Court stated at page 78, as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

The instant case involves the interpretation of an Act of Congress because the City is seeking priority not by

virtue of any State law but by reason of a claim asserted under the Acts of Congress relating to bankruptcy.

Under Section 64(a) of the Bankruptcy Act, the amount and legality of tax claims must be determined by the Bankruptcy Court, and in *New Jersey v. Anderson,* 203 U. S. 483, this Court interpreted this section, as follows:

(Pages 491 and 492)

> "* * * a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this Court."

Regardless of the interpretation of the *Atlas Television* case, the issue whether the tax imposed by the City Sales Tax Law does in fact constitute a tax upon a vendor within the meaning of the Bankruptcy Act giving preference to taxes, is a Federal question to be determined exclusively by the Federal Court, and the determination of the State Court with respect thereto is not conclusive in that respect.

The Circuit Court of Appeals below having twice held that the Local Law does not impose a tax upon the vendor within the meaning of Section 64(a) of the Bankruptcy Act, its determination should be followed.

POINT V.

The cases cited by petitioner are distinguishable.

In none of the New York cases which involved the construction of the Local Law, except the *Atlas Television* case, the *Lazaroff* case and the case at bar, was the question considered as to whether the obligation of a vendor under the statute was *qua* tax or *qua* debt. The *Lazaroff* case and the case at bar squarely held it to be *qua* debt. The *Atlas Television* case failed to pass on the question because the conclusion which the Court arrived at was the same regardless of whether the obligation be a tax or a debt, for even as a debt the City was entitled to priority under state law.

The cases which have been cited by petitioner are for the most part cases in other jurisdictions involving different statutes, and do not conflict with the decision in this case. These cases may briefly be distinguished as follows:

The case of *Queens Vending Corp.* v. *City of New York*, 94 N. Y. L. J. 318 (July 31, 1933) aff'd 246 App. Div. 594, has no application, because in that case the issue was not raised as to whether the liability of the vendor was *qua* tax or *qua* debt. The court there merely determined that where the Comptroller pursuant to Section 3 of the Local Law, had fixed a price below which the vendor need not collect the tax from the purchaser, that the failure of the vendor to collect such tax from the purchaser on sales below such price, did not violate that portion of the Local Law which made it unlawful for the vendor to absorb the Sales Tax. The fact that it is unlawful to absorb the tax, is proof that the tax is not upon the vendor.

Matter of David Brown Printing Co. Inc., 285 N. Y. 47, likewise did not decide whether the claim of the City of New York was *qua* tax or *qua* debt because such issue was not there involved. That case merely determined that in a proceeding arising in the State Court where an assignment for the benefit of creditors had been made, that the claim of the City for sales tax was on the same parity as the claim of the State of New York for franchise tax, upon the theory that both claims depend upon the same sovereign right and that the City was acting as the agent for the State. On the same day which the Court of Appeals rendered its decision in *Matter of David Brown Printing Co. Inc.* (*supra*) it affirmed *Matter of Torpedo Dress*, 285 N. Y.—(March 6, 1941) which held that a claim of the State of New York for unemployment insurance taxes is entitled to priority over the claim of the City for sales tax, thus negativing the implication that the claim of the City is one for taxes entitled to the same parity as all taxes imposed by the State.

Jensen Candy Co. v. *State Tax Commission*, 90 Utah 359, has no application because the issue as to whether the obligation was a tax or a debt was not considered and the statute there involved is substantially different than the one at bar.

Barbee v. *Oklahoma Tax Commission*, 103 F. (2d) 114, is distinguishable for two reasons. The first reason is that the case was decided under the Bankruptcy Act as it existed prior to its amendment under the Chandler Act, whereas the instant case was decided under Bankruptcy Act as amended. This fact clearly appears in the decision of the District Court reported *sub nom. Matter of Kanaly*, 23 F. Supp. 995, 37 A. B. R. (N. S.) 588, wherein the

Court quotes the language of the Bankruptcy Act prior to its present amendment and further states as follows:

> "The question for determination is whether or not the claim for taxes, collected by the vendor, under the Bankruptcy Act, *constitutes a debt which is entitled to priority.*" (Italics ours.)

The issue, therefore, which was decided in *Barbee* v. *Oklahoma* (*supra*) was not whether the claim of the State of Oklahoma was a tax, but as the District Court there said whether the claim *"constitutes a debt which is entitled to priority"*.

The second reason is that it involves a different statute. The Oklahoma Sales Tax Law (Section 3, article 7, chapter 66, Session Laws 1935) expressly defines who is the taxpayer, as follows:

> "The term 'taxpayer' shall mean any person liable for any tax hereunder."

In the instant case, the New York statute does not define the term "taxpayer", but the statute has been construed both by the New York courts and by this very petitioner as making the purchaser the taxpayer and the vendor only a tax collector.

Colorado National Bank of Denver v. *Bedford*, 310 U. S. 41 we submit supports our view rather than that of petitioner. In that case the banks were required to collect from their customers a tax for the use of safe deposit boxes, to include such charge in the bills submitted to their customers, and to forward the collections to the State. This Court held that the user of the safe deposit box was the taxpayer and not the bank.

By analogy, the vendor under the Local Law, corresponds

to the bank in the *Colorado* case, and the purchaser to the user of the safe deposit box. The conclusion therefore follows that since the purchaser is the one ultimately liable for the tax, he is the taxpayer and not the vendor.

State Tax Commission v. *Spanish Fork,* 100 Pac. (2d) 575 has no application because the issue as to whether the obligation was a tax or a debt was not there involved or considered.

Foster v. *Miller,* 166 Ohio State 295 has no application for the same reason. Furthermore, the Ohio statute is different than the New York City Local Law as there the vendor is required to purchase prepaid tax receipts from the State of Ohio, and the effect thereof is to make the vendor pay to the State of Ohio the estimated amount of the tax even before the vendor makes any sales.

De Aryan v. *Akers,* 12 Cal. (2d) 781 is distinguishable in that the statute there involved is different. The statute there expressly provides that "The tax hereby imposed shall be collected by the retailer from the consumer insofar as the same can be done." It is to be noted the consumer is under no mandatory duty to pay, nor is he subject to the tax as under the New York statute.

Doby v. *State Tax Commission,* 234 Ala. 150 is inapplicable because the statute there involved is different. By Section 2 of the Alabama statute, there is levied:

> "(a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character * * * an amount equal to two per cent. of the gross proceeds of sales of the business,

except where a different amount is expressly provided herein."

Under such language the retailer is the "taxpayer" even though he may be permitted to pass on the tax to the ultimate consumer, and the Alabama statute is therefore not comparable.

Nolte v. *Hudson Navigation Co.*, 8 F. (2d) 859 has never been over-ruled but to the contrary has repeatedly been cited with approval. In principle it is still good law because not only do courts continue to emphasize the distinction between a debt and a tax, but the Bankruptcy Act likewise makes that distinction. Taxes are granted priority under Section 64(a) (4) whereas debts which are entitled to priority under the laws of the United States are governed by subdivision 5 of Section 64(a).

POINT VI.

Public policy does not require a reversal of the judgment of the court below.

This is not a case which calls for a reversal of the judgment of the court below upon the ground of public policy or public interest.

(1)

The interest of general creditors motivated the amendment of Section 64 of the Bankruptcy Act.

It is common knowledge that state priorities have taken too great a toll from bankrupt estates to the detriment of the general creditor, and for that reason the National Bankruptcy Conference recommended that state priorities be

omitted from the Bankruptcy Act as amended by the Chandler Bill.

The Chandler Bill (H. R. 12889) was the result of a thorough study over a period of years by the National Bankruptcy Conference, a nationwide organization of persons who were connected with all phases of bankruptcy law and procedure, and Jacob I. Weinstein, Esq., and Reuben G. Hunt, Esq., were active members of said Conference.

In the 74th Congress, 2d Session, Committee Print, of the Analysis of H. R. 12889, introduced by Congressman Chandler, May 28, 1936, we find the statement of Mr. Weinstein at page 201 thereof as follows:

> "We have deleted all state priorities except in the case of a landlord, but have restricted that priority to rent for actual use and occupancy which accrued within three months before bankruptcy. Under the laws of many States a landlord is granted either a priority or a lien for rent. Many leases contain a clause permitting the acceleration of rent for an unexpired term. Therefore, landlords frequently present claims for rent for unexpired terms and obtain priority under their State laws. *The statistics gathered by the Attorney General indicate that rent claims consume a very substantial portion of an estate, and in smaller estates not infrequently use up all of the funds.* In some jurisdictions, where the rent has become a lien without the necessity of distraint before bankruptcy, the claim takes priority over all administration costs, including the costs of preserving the estate. Such a situation is inequitable. In Section 67(c) we make a similar provision to cover the claims of landlords which by State law are made liens, as distinguished from priorities.
>
> *"For like reasons of policy, we have excluded, as indicated, all other state priorities. The necessity for so doing is obvious; many estates have been consumed, to the exclusion of creditors, by the ever-increasing classes of state priorities."* (Italics ours.)

General creditors create the estate. The taxing authorities do not add one dollar to the estate. While credit is being extended, they delay the collection of taxes for a period of years, as in the instant case, and then demand priority of payment. This vicious practice is clearly expressed by Reuben G. Hunt, Esq., in his comments on tax claims in bankruptcy (quoted in *Matter of Raflowitz*, 43 A. B. R. (N. S.) 358) as follows:

> "When the tax collector finally swoops down, small estates are shorn more completely of their assets than in Biblical times when the locusts ate up all the honey, and the four winds of the earth could not accomplish a more complete devastation to the utter rout of the unsecured creditors.
>
> "The Bankruptcy Act was drafted with the principle that equality is equity in mind, but there has been a tendency in recent years for the typical bankruptcy proceedings to resolve itself into a process in which one preferred party after another slices off a portion of the available assets, with little or none remaining for distribution to general creditors. *This process ought not to be extended beyond the clear requirements of the controlling statutes.* Tuttle, *J.*, in *Matter of Standard Composition Co.*, 37 Am. B. R. (N. S.) 285, 292, 23 F. Supp. 391, 395." (Italics ours.)

General creditors as a large part of the public and especially the little business man selling to retailers, have a vital interest in the equitable distribution of a bankrupt's estate. This principle is generally recognized as an integral part of our economy. No impelling public policy requires that they be deprived of their dividend.

(2)

Section 64 of the Bankruptcy Act was deliberately amended to omit priority for debts owing to States other than for rent claims.

An omission of specific words from a statute is the equivalent of a statutory denial of rights flowing therefrom. This principle was recently enunciated in *In re Carden,* F. (2d) (C. C. A. 2nd) decided March 24th, 1941.

(3)

Public interest does not demand that the clear intent of the legislative body of City of New York be thwarted.

The proper forum for the relief now sought by petitioner is Congress or the legislative body of the City of New York.

Petitioner in its brief (p. 27) concedes that the intention of the law was to make the tax a consumer's tax so that the public would become conscious of what unemployment relief was costing the community.

Public interest does not demand an extension of the specific power granted to the municipality contrary to the express intent of the local legislative body.

(4)

Public policy does not require the creation of doubt and uncertainty as to established law and legal principles.

Established law should not be given a *"coup de grâce"* and placed "in repose" by the surreptitious seizure and hoisting of the "public policy" banner by one litigant to the exclusion of the other. Confusion and doubt as to the law can only follow in its wake. Such is not the policy of this Court.

Petitioner in the numerous cases in which it has appeared as a party has consistently taken the position and motivated the Courts to adjudicate that the Sales Tax was imposed on the purchaser.

Now petitioner would have this Court throw into discard the determination, and the expression in numerous opinions of the Courts of the State of New York and this Court, that the tax is on the purchaser.

If the Court below is affirmed, the judgment will be in harmony with adjudications heretofore made both by this Court and the Court of Appeals of the State of New York. If reversed, it will undoubtedly cast doubt upon decisions heretofore made by both the Federal and State Courts. It certainly will not be four square with the position heretofore taken by the City of New York both before this Court and the Courts of the State of New York.

CONCLUSION.

The order of the Circuit Court should be affirmed.

Respectfully submitted,

BENJAMIN SIEGEL,
Attorney for Trustee, Respondent.

BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN,
On the Brief.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 863.—October Term, 1940.

The City of New York, Petitioner, vs. Michael Feiring, Trustee in Bankruptcy of National Studios, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether the obligation imposed upon sellers by a New York City sales tax (No. 20, Local Laws of New York City, 1934, as amended, No. 24, Local Laws of New York City, 1934), to pay a tax laid upon receipts from sales of personal property and collectible alternatively from the buyer or the seller is a "tax" entitled to priority of payment in bankruptcy under § 64 of the Bankruptcy Act.

Petitioner, New York City, filed its claim against the estate of the bankrupt for taxes on sales of tangible property by the bankrupt during the five years following January 10, 1934. In the proceeding before the referee it appeared that the bankrupt had failed to collect most of the taxes from its buyers as required by the applicable law, and that the sole issue was with respect to the right of the City to priority of payment of the City's claim over those of general creditors. The District Court set aide the referee's order allowing the priority and the Court of Appeals for the Second Circuit affirmed, 118 F. (2d) 329, holding that the sum claimed was not a tax, but that the "bankrupt was liable to the city as a tax collector who owes as a debt the amount of taxes collected or to be collected". We granted certiorari April 14, 1941, because of the suggested failure of the court below to follow our decision in *New York City* v. *Goldstein*, 299 U. S. 522, reversing *Matter of Lazaroff*, 84 F. (2d) 982, and of the asserted conflict in principle of the decision below with that of the Court of Appeals for the Tenth Circuit in *Barbee, Trustee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114.

Section 64 of the Bankruptcy Act, as amended June 22, 1938, 52 Stat. 840, 874, awards priority of payment, in bankruptcy, to

"taxes legally due and owing by the bankrupt to the United Stat or any state or any subdivision thereof . . ." Whether t present obligation is a "tax" entitled to priority within the mea ing of the statute is a federal question. *New Jersey* v. *Anderso* 203 U. S. 483, 491; cf. *Hormel* v. *Burnet*, 287 U. S. 103, 11 *Palmer* v. *Bender*, 287 U. S. 551, 555; cf. No. 393, *United Stat* v *Pelzer*, decided March 3, 1941. Intended to be nationwide in i application, nothing in the language of § 64 or its legislative hi tory suggests that its incidence is to be controlled or varied by t particular characterization by local law of the state's demand Hence we look to the terms and purposes of the Bankruptcy Act a establishing the criteria upon the basis of which the priority is t be allowed.

As was pointed out in *New Jersey* v. *Anderson, supra,* 491 the priority commanded by § 64 extends to those pecuniary burden laid upon individuals or their property, regardless of their consent for the purpose of defraying the expenses of government or o undertakings authorized by it. The particular demand for whic the City now claims priority of payment as a tax is created and defined by state enactment. We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a "tax" but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78, 80, 81 and cases cited; *United States* v. *Pelzer, supra;* No. 495, *Ryerson* v. *United States*, decided March 3, 1941.

The present exaction is that which was considered, and its constitutionality sustained in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. The discussion of it there will be supplemented here only so far as is needful for the disposition of the issue now before us. It was enacted by the municipal assembly of New York City as an emergency revenue measure to defray the expense of unemployment relief, pursuant to authority conferred by the state legislature. Ch. 815, New York Laws 1933; Ch. 873, New York Laws 1934. Originally No. 24 of New York Local Laws, 1934, it has since been annually renewed with minor amendments not now material. Section 2 lays a tax upon receipts from retail sales in New York City of tangible personal property, and requires the seller, with exceptions not now material to charge the buyer with the amount of the tax, separtely from the sales price and to collect the tax from him.

Penalties are imposed by § 15 for the seller's willful failure to comply with these requirements. Section 2 also commands that the tax "shall be paid by the purchaser to the vendor for and on account of the City of New York". Section 5 requires the seller to file with the City Comptroller a "return of his receipts and of the tax payable thereon" for prescribed periods. Section 6 requires the seller, at the time of filing a return to pay to the Comptroller the taxes upon all receipts required to be included in his return and also provides that "all taxes for the period for which the return is required to be filed shall be due from the vendor and payable to the Comptroller on the date limited for the filing of the return for such period without regard to whether the return is filed or whether the return which is filed correctly shows the amount of receipts and taxes due thereon". But if the seller fails to collect the tax § 2 also makes it the duty of the purchaser to file a return with the Comptroller and commands that "such tax shall be payable by the purchaser directly to the Comptroller".

By § 8 whenever either the seller or purchaser "shall fail to collect or pay over any tax and/or to pay any tax" imposed by the law, the City is authorized to bring an action for its recovery or, as an alternative remedy, the Comptroller is authorized to issue a warrant directed to the sheriff of the county, commanding him to levy upon and sell the real and personal property of the seller or the purchaser and apply the proceeds to the payment of the tax. In construing these provisions the New York Court of Appeals has held that while the Comptroller may proceed under § 2 to collect the tax from the purchaser if he has not paid it to the seller, see *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, the duty to pay the tax is also laid upon the seller w..ether he has in fact collected it and regardless of his ability to collect it from the buyer. *Matter of Atlas Television Co.*, 273 N. Y. 51; *Matter of Brown Printing Co., Inc.*, 285 N. Y. 47.

The statute thus contains provisions which in its normal operation are calculated to enable the seller to shift the tax burden to the purchaser, see *Matter of Kesbec, Inc.* v. *McGoldrick, supra*, 297; *Matter of Merchants Refrigeration Corp.* v. *Taylor*, 275 N. Y. 113, 124; cf. *McGoldrick* v. *Berwind-White Co., supra*, 43, 44. But it is plain that both the vendor and the vendee are made liable for payment of the tax *in invitum* without regard to those provisions by which the seller may shift the incidence of the tax to the

buyer and the tax may be summarily collected by distraint of the property of either the seller or the buyer. A pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent thus has all the characteristics of a tax entitled to priority of payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act. *New Jersey* v. *Anderson, supra.* Cf. *United States* v. *Updike,* 281 U. S. 489, 494. It is not any the less a tax laid on the seller because the statute places a like burden in the alternative on the purchaser or because it affords to the seller facilities of which he did not avail himself to pass the tax on to the buyer. While an action in debt may be resorted to for the recovery of a tax it is evident that in this case the bankrupt is liable to the state only because it owes a tax. *Price* v. *United States,* 269 U. S. 492, 500; *Milwaukee County* v. *White,* 296 U. S. 268, 271.

In *New York City* v. *Goldstein, supra,* we reversed *per curiam,* citing *Matter of Atlas Television Co., supra,* a decision of the Court of Appeals for the Second Circuit that a claim of the City for payment of tax by the seller was not entitled to priority under § 64 of the Bankruptcy Act. The court below attributed our reversal to the circumstances that at that time, though not now, § 64 allowed priority to debts entitled to priority under state law, and to the decision of the state court in the *Atlas* case, that upon a general assignment for the benefit of creditors made under state law a claim against the seller for the sales tax was entitled to priority. But in placing this interpretation upon our decision in the *Goldstein* case the court below overlooked the fact that the Court of Appeals ruled in the *Atlas* case that an ordinary debt due the state is not entitled to priority by state law, and it sustained the priority in that case only on the ground that the demand was for a tax, the unqualified duty to pay which was placed by the statute on the seller. This interpretation of the state statute was reaffirmed by that court in the *Matter of Brown Printing Co., Inc., supra.* For reasons already given the duty imposed upon the seller by the taxing act thus construed is also a tax within the meaning of § 64 of the Bankruptcy Act.

Reversed.

Mr. Justice ROBERTS thinks the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals.